87-393

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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73 pp

QUESTIONS PRESENTED

For purposes of implementing ERISA'S withdrawal liability scheme, 29 U.S.C. § 1301(b)(1) provides that all trades or businesses under common control (whether or not incorporated) shall be deemed a single employer under regulations consistent and coextensive with Treas. Reg. § 11.414(c). For purposes of identifying an "employer" under 29 U.S.C. § 1301(b)(1)—

(a) Does Treas. Reg. § 11.414(c) provide the exclusive rules for establishing the existence of a controlled group, having been adopted by the PBCC in 29 C.F.R. § 2612 as the governing rule for ERISA?

(b) Does the need for regulatory approval *per se* preclude a stock purchase agreement from being characterized as an option, thereby shielding the purchaser from liability under the constructive ownership rule of Treas. Reg. § 11.414(c)?

(c) Is "operational" control a prerequisite for liability under § 1301(b)(1) even though Treas. Reg. § 11.414(c) defines "control" solely in terms of an objective stock ownership test?

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v.

CENTRAL TRANSPORT, INC., et al.,[1]
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Central States, et al. respectfully petition this Court to issue a Writ of Certiorari to review the opinion and judgment of the

[1] Respondents, collectively styled "Central Transport" or the "CenTra Group" are: Central Transport, Inc., GLS LeasCo, Inc., CenTra, Inc., Bancroft Trucking Co., C.T. Transport, Inc. (Ohio), C.T. Transport, Inc. (Ontario), Central Cartage Co., Central-On-Line-Data Systems, Inc., Central Recapping, Inc., Cruiser Tours, Inc., Detroit International Bridge Co., General Highway Express Co., McKinlay Transport, Ltd., Michigan Express, Inc., Mohawk Motor, Inc., Port Side Transport, Inc., Roethlisberger Transfer, Superior Forwarding Co., Mohawk Cartage Co., Consolidated Forwarding Co., Flint Cartage Co., and Crown Enterprises, Inc. Petitioners Loran W. Robbins, Marion M. Winstead, Robert C. Sansone, R. Jerry Cook, Howard McDougall, Robert J. Baker, R.V. Pulliam, Sr. and Arthur H. Bunte, Jr. are Trustees of the Central States Pension Fund. The Central States Pension Fund is a multiemployer pension plan within the meaning of ERISA (29 U.S.C. § 1002(2) and (37)). Established in 1955 in accordance with the requirements of Section 302(c)(5) of the Labor Management Relations Act (29 U.S.C. 186(c)(5)), the Fund serves some 500,000 participants and their families. Some 12,000 employers in 40 states contribute to the Fund pursuant to thousands of collective bargaining agreements with local Teamster unions. *See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559 (1985); *Schneider Moving and Storage Co. v. Robbins*, 466 U.S. 364 (1984). Petitioners will henceforth be designated as the "Pension Fund."

United States Court of Appeals for the Sixth Circuit, entered on April 17, 1987.

OPINIONS BELOW

The opinions of the District Court for the Eastern District of Tennessee are reported at 639 F. Supp. 788 and 640 F. Supp. 56 and are set forth in Appendices A and B. An amended judgment appears in Appendix C. The opinion of the Court of Appeals, which affirmed the opinions of the district court for all the reasons stated therein, is unpublished and is set forth in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1987. A petition for rehearing *en banc* was denied on June 5, 1987 (App. E). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381, *et seq.* (MPPAA), are set forth in Appendix F.

STATEMENT OF THE CASE

1. Nature of the action

This action arose as a result of the Pension Fund's application of ERISA's controlled group definition of "employer" (29 U.S.C. § 1301(b)(1)) to Respondents in calculating and assessing a withdrawal liability claim arising under MPPAA (29 U.S.C. § 1381, *et seq.*).

On November 29, 1983, Respondents Central Transport and GLS LeasCo, affiliates and members of the CenTra controlled group, executed stock purchase agreements for substantial consideration, which gave them an exclusive, irrevocable right to purchase, together, 100% of the stock of Mason and Dixon Lines, Inc. (M-D) and its wholly-owned subsidiary, Mason and Dixon

Tank Lines (Tank Lines).[2] Consummation of the Central Transport/M-D stock purchase agreement was subject to ICC approval (which was obtained on March 7, 1984). On December 31, 1983, one month after the stock purchase agreements were executed, Tank Lines effected a statutory partial withdrawal from the Pension Fund. The Fund's subsequent calculation and assessment of withdrawal liability was predicated on the belief that M-D and Tank Lines had become part of the CenTra Group on November 29, 1983, the date the stock purchase agreements were executed, and that Respondents were therefore the "employer" by operation of 29 U.S.C. § 1301(b)(1) and Treas. Reg. § 11.414(c).

29 U.S.C. § 1301(b)(1) provides that all trades or businesses under common control shall be treated as a single employer for all purposes of Title IV of ERISA (and hence for all purposes of MPPAA). This means that if any member of a controlled group withdraws from a multiemployer plan, the entire group — the "employer" — is deemed to have withdrawn and is jointly and severally liable for the resulting liability. That liability is also calculated by aggregating the contribution history of all members of the group for those periods required by the statute to be taken into account (29 U.S.C. § 1391, 1386). (A-66—67).

Treas. Reg. § 11.414(c), adopted by the Pension Benefit Guaranty Corporation (PBGC) through 29 C.F.R. § 2612 to implement 1301(b)(1), sets forth detailed rules for establishing the existence of a controlled group. (A-41—48). With regard to corporations, a controlled group exists if a mechanical, objective stock ownership test is satisfied. This test may be met through the "direct" or "constructive" ownership of a requisite percent of stock (80%) by corporations or shareholders related in a specified manner. (A-44—47). The Regulation expressly provides that an "option" or "an option to acquire an option" or any "series" of such options are deemed actual ownership of the stock. (A-47). However, neither ERISA, the Internal Revenue Code, Treas. Reg. § 11.414(c), nor any other Treasury Regulation defines the term option. Hence, the present dispute arose over the Pension

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[2] For purposes of this appeal (as for the actions below), Respondents were admittedly members of a controlled group (the CenTra Group) on the date of withdrawal. The issue is whether Mason and Dixon and Tank Lines became part of the CenTra Group on November 29, 1983 by virtue of the Central Transport and GLS LeasCo stock purchase agreements.

Fund's characterization of the Central Transport/M-D stock purchase agreement as an "option" and its consequent treatment of Respondents as the "employer" by virtue of their constructive ownership of stock.

The courts below ruled that M-D and Tank Lines did not become part of the CenTra group by virtue of the stock purchase agreements and that Respondents were therefore not the "employer" for any purposes of ERISA or the Pension Fund's claim. The decisions below conflict with those of other courts of appeals concerning both the rules for establishing the existence of a controlled group and the principles for determining whether a contract is an option. Since fund trustees and the PBGC need to make reasonable determinations as to the identity of an "employer" under 29 U.S.C. § 1301(b)(1), uniformity is essential and the following recurrent issues require ultimate resolution by this Court: whether Treas. Reg. § 11.414(c) provides the exclusive rules for determining the existence of a controlled group; whether a contingency to closing — however insubstantial — prevents a validly formed contract from being characterized as an option for purposes of applying this Regulation; and whether actual operational control is a prerequisite to the application of 29 U.S.C. § 1301(b)(1) although Treas. Reg. § 11.414(c) defines control solely in terms of an objective ownership test.

2. Facts

a. The partial withdrawal at Tank Lines and the acquisition of Mason-Dixon and Tank Lines by Central Transport and GLS LeasCo

Under 29 U.S.C. § 1385(b)(2)(A)(i), a "partial withdrawal" occurs if an employer permanently ceases to have an obligation to contribute to a multiemployer plan under "one or more but fewer than all" of its collective bargaining agreements and work of the type previously covered by the contract continues to be performed. (A-35—36). Tank Lines partially withdrew from the Pension Fund as a result of the following undisputed facts. Prior to December 31, 1983, Tank Lines contributed to the Pension Fund pursuant to five collective bargaining agreements ("CBAs") with five Teamster local unions. On November 29, 1983, a five-member bargaining unit, located in Charlotte, N.C., voted to decertify one of these locals, Local 71. On December 7,

1983, the NLRB certified the election results, and on December 31, 1983, the CBA covering the Charlotte bargaining unit expired, permanently ending Tank Lines' obligation to make contributions to the Pension Fund under its CBA with Local 71. Since the Charlotte employees continued to perform work of the type previously covered by the CBA, and since Tank Lines remained under a continuing obligation to make contributions under its four other CBAs with Teamster locals, a "partial withdrawal" occurred within the precise meaning of 29 U.S.C. § 1385(b)(2)(A)(i). (Complaint, ¶¶ 44-48, 135-139).

Tank Lines was the wholly-owned subsidiary of M-D since 1936. On November 29, 1983, Respondent Central Transport entered into a stock purchase agreement ("SPA") with M-D and its shareholders, whereby it acquired, for $100,000 consideration, the exclusive right to purchase 78% of the shares of M-D. (A-72). The only condition precedent to the formation of this contract (as distinct from its closing) was that Transport's affiliate, Respondent GLS LeasCo., succeed in acquiring all of the outstanding shares of The Crown Enterprises (and thus the remaining 22% of the M-D stock).[3] This condition was satisfied on November 29, 1983, when GLS LeasCo simultaneously executed a SPA with Crown whereby it acquired the exclusive right to purchase 100% of its shares. (Complaint, ¶ 53).[4] As of November 29, 1983, then, Central Transport and GLS LeasCo possessed an exclusive contractual right, supported by consideration, to purchase, together, 100% of the stock of M-D and Tank Lines.

Para. 3.4 of the SPA clarified the exclusive nature of Central Transport's right to the stock:

> *Right to Purchase or Acquire*: No one *now* has, *nor on the Control Date nor on the Closing Date* will have, any equity or rights by way of option, subscription, contract or otherwise to purchase or otherwise acquire any por-

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[3] The Preamble to the SPA provided: "Seller and Buyer have agreed that this Stock Purchase Agreement is contingent upon Buyer's affiliated company GLS LeasCo, Inc. executing a certain stock purchase agreement with the stockholders of Crown, and Crown of even date herewith, for the purchase of all of the capital stock issued by Crown." (A-72).

[4] There was never any dispute over the GLS LeasCo/Crown stock purchase agreement; hence, all further discussion of the "option" issue refers only to the Central Transport/M-D contract.

> tion of the Purchased Shares or other securities of Mason and Dixon or Subsidiary *other than Buyer hereunder, or other than as may be granted* by Buyer. (A-77—78, emphasis added).

Para. 8.2 of the SPA augmented Transport's control over the M-D stock by permitting a complete right of assignment, i.e. both in the event the ICC declined to approve the transfer and at any other time: "Buyer shall also have the right to make such assignment at any time pending determination of the applications filed with the Regulatory Authorities." In the event Transport "exercise[d] its right of assignment," M-D was "bound to the Buyer's assignee with respect to their agreements." (A-87—88).

The SPA created numerous rights and obligations as of the date the agreement was executed. For example, M-D was contractually obligated: to cooperate with the preparation, filing and prosecution of applications for regulatory approval (¶¶ 5.1, 28.0, A-88, 104—105); to maintain its equipment and other assets (¶ 11.3, A-90); to obtain Transport's consent to all contracts except those for normal and necessary supplies (¶ 3.12, A-80); to obtain Transport's consent to all important managerial decisions (¶ 11.0, A-89—91); to make available its books and records (¶ 6.3, A-86); to deliver a non-revocable proxy (¶ 6.3, A-86); and to agree to a non-competition clause designed to remain in effect even if the SPA was cancelled (¶ 15.0, A-95—96).

Most important, M-D was contractually obligated to place a controlling amount of its voting stock into escrow within three business days after execution of the contract (¶ 10.2, A-88—89) and to carry forward to subsequent years its net operating losses (and those of Tank Lines) for years "ending after the date of execution" of the SPA. M-D also agreed not to vote dividends or stock splits or to redeem any shares as of December 31, 1982 without Transport's consent. (¶¶ 3.8, 3.19, A-78—79, 82). Acting as the owner of M-D for all of 1984, Central Transport filed a consolidated tax return and obtained a $1.5 million tax benefit in 1984 as a result of this affiliation. (Jt. App. 221-22).

On December 21, 1983, Transport applied to the ICC for temporary authority to control M-D's operations pending a grant of permanent authority. Temporary authority was granted on December 27, 1983. However, notice of approval was not served

until January 4, 1984 (A-110—111), and Transport did not assume operating control until January 9, 1984 (the "Control Date" for purposes of the SPA). On March 29, 1984, within three months of Transport's assumption of operating control and within three weeks of Transport's obtaining permanent authority from the ICC, M-D filed Chapter 11 proceedings. Transport nevertheless intended to consummate the SPA and applied to the ICC for various extensions of time in which to do so. The agreement was closed in February, 1985. (Complaint, ¶¶ 50, 61, 63).

b. Harm to the Pension Fund and calculation of withdrawal liability

Under MPPAA, liability resulting from a partial withdrawal cannot be calculated until the end of the year following the year of withdrawal, the so-called "test year." (29 U.S.C. § 1386, A-37). At this time, the employer's contributions for the "test year" (here, 1984) are compared with its contributions for the five plan years preceding the year of withdrawal (here, 1978-1982). By the end of 1984, a massive contribution decline had occurred within the CenTra Group, largely (but not entirely) due to the loss of 1,000 jobs at M-D subsequent to Central Transport's assumption of operational control. (R-46, Defendants' Brief in Opposition to Motion for Summary Judgment).

The total withdrawal liability assessment was $26,295,533.25.[5] The contribution decline upon which this figure was based was set forth in the unrebutted Affidavit of Thomas Frawley, Director of the Pension Fund's Plan Compliance Division (A-69—71). This Affidavit revealed that the aggregated contribution base units ("CBUs") of the CenTra controlled group (including M-D and Tank Lines) declined from a five-year average of 208,557 CBUs (1978-1982) to 111,492 CBUs in 1984 and 84,731 in 1985. Correspondingly, the Fund experienced an estimated reduction in contribution income of $5,303,631 in 1984 and $7,508,808 in 1985. During just the two plan years following

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[5]At the time of the Pension Fund's assessment, the CenTra Group was a multi-corporation conglomerate worth approximately a quarter of a billion dollars having cash assets in excess of $16 million and marketable securities worth more than $17,500,000. (Jt. App. 279-281, Defendants' Supplemental Reply to Plaintiffs' Motion for Preliminary Injunction with Affidavit of D. DiCaro).

the "event" of withdrawal, the Fund lost contribution income in an amount equal to nearly half of the entire assessment.[6]

3. Proceedings below

Bypassing MPPAA's mandatory arbitration procedure, Respondents filed an action under 29 U.S.C. §1451(c), seeking declaratory and injunctive relief in the District Court for the Eastern District of Tennessee. On January 17, 1986, the court enjoined the Fund from proceeding to arbitration (pursuant to 29 U.S.C. §1401) and from collecting interim payments of withdrawal liability (pursuant to 29 U.S.C. §1399(c)(2)) pending a judicial determination whether Respondents were the "employer." 639 F.Supp. 788. On March 5, 1986, the court granted Respondents' Motion for Summary Judgment, declaring that M-D and Tank Lines had not become part of the CenTra controlled group on the date of withdrawal and that the CenTra

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[6]Respondents attempted to persuade the courts below that the Pension Fund's actual harm was limited to the permanent loss of contributions for the five employees who voted to decertify Local 71. This argument was predicated on the view that 29 U.S.C. § 1301(b)(1) is merely a collection device and should not be utilized to calculate withdrawal liability under 29 U.S.C. §§ 1386 and 1391, i.e. by aggregating the contribution history and post-withdrawal decline of component members of a controlled group. Neither the district court nor the court of appeals accepted this argument, recognizing that Tank Lines' liability could not be calculated in isolation and the Pension Fund's harm was *not* "de minimus." (A-3—4, A-28). Even if the CenTra affiliates are excluded from the calculation, the assessment will still be $17,120,963.12, based upon the aggregated contribution history of M-D and Tank Lines. (See Frawley Affidavit, Jt. App. 291-95). It may be noted that the Pension Fund's proof of claim in the M-D bankruptcy proceedings will yield little if any recovery. Pursuant to a confirmed Plan of Reorganization, the Pension Fund will receive preferred stock presently valued at 10% of the amount of the debt. However, the stock cannot be redeemed for 20 years and the Fund will not be entitled to dividends or interest. 63 B.R. 176 (Bankr. M.D. N.C. 1986). (The above result occurred because the Pension Fund was placed in a separate class from other unsecured creditors. The Fund has appealed its disparate treatment to the Court of Appeals for the Fourth Circuit.) In *The Mason and Dixon Tank Lines v. Central States, Southeast and Southwest Areas Pension Fund*, No. CIV-2-85-471 (E.D. Tenn. 1986), the district court held that the Pension Fund's application of 1301(b)(1) was legally correct in all respects. However, for equitable reasons, it reduced the Fund's ability to recover on the $17 million claim by limiting Tank Lines' liability to 25% of its net worth. The decision is pending appeal in the Sixth Circuit. The net effect of these decisions is that each member of the controlled group has managed to avoid all or most of its liability, leaving the Pension Fund, its participants and other contributing employers to shoulder the funding burden left as a result of the post-withdrawal contribution decline.

affiliates were not the "employer." 640 F.Supp. 56. On April 17, 1987, following a consolidated appeal, the Sixth Circuit affirmed the two decisions of the district court for all of the reasons stated therein.

The district court ruled, first, that an option does not exist unless it can be exercised at the "present election" of the optionee. Since the ICC had not yet approved the transfer on December 31, 1983 (the date of withdrawal), Central Transport could not close on that date and could not, therefore, be deemed the constructive owner of the M-D stock. (A-20). The district court rejected the Fund's position that the dispositive date for determining whether a contract is an option is the date of its formation not its consummation and that, as of this date, the SPA, by its own terms, conferred at least as much control over the stock of M-D that an option would confer, if not more.

In affirming, the Court of Appeals also declined to consider the specific question whether a "present election" requirement would preclude the existence of an option even if a particular contingency to closing were insubstantial and the risk of its non-occurrence had been assumed by the parties to the contract.[7] Approving the district court's *per se* approach, the court rejected the Fund's argument that even if contingencies are relevant, ICC approval represented an insubstantial contingency in that even prior to deregulation of the trucking industry in 1980, the Commission had approved over 95% of all applications filed and the parties to the contract themselves manifested a belief in the certainty of ICC approval when they agreed to an immediate transfer of important rights and provided that the $100,000 consideration would be deemed a "non-refundable deposit" even should the transfer ultimately be disallowed.

As a second reason for concluding that Respondents were not the "employer," the district court stated that even if the stock ownership test had been satisfied, controlled group liability does not exist unless the owner of the stock also exercises actual control over the acquired company's operations. Since the ICC

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[7] Respondents raised the "present election" argument for the first time in a Reply Brief filed on the eve of oral argument on its Summary Judgment motion. Hence, the district court did not have the benefit of a full discussion of the issue or the authorities subsequently cited to the Sixth Circuit on appeal.

did not serve notice of its grant of temporary authority until January 4, 1984, although the decision to approve was made on December 27, 1983, Transport could not legally control the operations of M-D and Tank Lines on the date of withdrawal, thereby leaving unsatisfied the operational control requirement for liability. (A-6—7, 22). The court rejected the Fund's contention that the operational control requirement cannot be reconciled with the constructive ownership basis of liability, the total absence of such a requirement in Treas. Reg. § 11.414(c), and the fact that optionees are not entitled to exert operational control over a company prior to exercising the option.

Finally, although corporate controlled groups are expressly defined in Treas. Reg. § 11.414(c), the district court ruled that 26 U.S.C. § 1563 was more "on point" than the Regulation adopted by the PBGC to implement ERISA, because the component members of the CenTra group were "corporations" and a dispute arose concerning the ownership of "stock." (A-19). The court rejected the Fund's position that the rules set forth in Treas. Reg. § 11.414(c) were Congressionally intended to be applied uniformly to *all* trades or businesses (including corporations). By drawing instead upon subsections of 26 U.S.C. § 1563 that relate *solely* to corporations and were expressly omitted from 414(c), the court accorded Respondent corporations separate and different treatment, thereby excluding them from liability as an employer under 29 U.S.C. § 1301(b)(1). (A-18—22).

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED TO ASSURE THAT UNIFORM RULES AND DEFINITIONS WILL BE APPLIED TO IDENTIFY AN "EMPLOYER" UNDER 29 U.S.C. § 1301(b)(1) FOR PURPOSES OF IMPLEMENTING ERISA'S TERMINATION AND WITHDRAWAL LIABILITY SCHEMES

Plan trustees and the PBGC must be able to implement the statutory mandate to collect withdrawal and plan termination liability without protracted litigation and needless expense. To this end, Congress provided a definition of "employer" which anticipated that the precise, detailed regulations promulgated under Section 414(c) of the Internal Revenue Code would be the framework uniformly applied. In affirming the district court's

application of 26 U.S.C. § 1563, as well as its restrictive definition of the term "option," the Sixth Circuit has created precedent that is inimical to the purposes and policies underlying ERISA and conflicts with decisions of other courts of appeals. As a result, confusion now exists with regard to basic rules and definitions necessary to ascertain the existence of a controlled group and hence the "employer" for purposes of enforcing Title IV of the statute.

In particular, uncertainty now exists with regard to three issues of paramount importance in applying ERISA's controlled group rule: (1) whether Treas. Reg. § 11.414(c) provides the exclusive rules for ascertaining the existence of a controlled group or whether 26 U.S.C. § 1563 in its entirety is also relevant; (2) whether "control" is to be measured solely by an objective ownership test or whether operational control is also a prerequisite to application of 1301(b)(1) and if so, what kind and how much; (3) whether an option exists if the contract contains an irrevocable offer supported by consideration or whetner a condition subsequent to the formation of the contract but precedent to its closing precludes its characterization as an option regardless of the nature and substantiality of that condition or the purchaser's assumption of risk.

The above uncertainties place plan trustees in an untenable position because they can no longer rely on the plain language of ERISA and established principles of contract law in making determinations concerning the existence of an "employer" under § 1301(b)(1) when calculating and assessing withdrawal liability. Since § 1301(b)(1) applies equally to single employer plans, these uncertainties will also affect the ability of the PBGC to administer the pension insurance program and to apply ERISA's controlled group rule to calculate and collect termination liability.

Uniform rules for identifying an employer are a prerequisite to expeditious, cost-effective enforcement of Title IV of ERISA and the issues raised by this appeal are likely to recur until resolved by this Court, thereby adversely affecting the financial soundness both of multiemployer plans and the PBGC. Given the fundamental importance of the controlled group definition of "employer" to Title IV of ERISA, the issues for review are of sufficient national importance to justify the granting of a writ.

1. The lower courts' selection of 26 U.S.C. § 1563 instead of Treas. Reg. § 11.414(c) disregards the plain meaning of applicable statutes, creates a conflict in the circuits, and results in corporations being treated differently from other trades or businesses

As established by this Court, "[t]he starting point for interpreting a statute is the language of the statute itself," which is ordinarily conclusive. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). 29 U.S.C. § 1301(b)(1) provides:

> For purposes of this subchapter [Subchapter III, Title IV], *under regulations prescribed by the corporation [PBGC]*, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer. *The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.* (A-35, emphasis added).

On October 31, 1975, the Treasury Department promulgated Treas. Reg. § 11.414(c) (40 F.R. 51435) and on March 25, 1976, the PBGC promulgated 26 C.F.R. 2612.2, which formally incorporated this Treasury Regulation to implement 29 U.S.C. § 1301(b)(1). (41 F.R. 12303). Accordingly, Treas. Reg. § 11.414(c), having been adopted by the PBGC as the governing rule under ERISA, must be upheld as providing the exclusive and dispositive definitional framework for establishing the existence of a controlled group.

Significantly, neither the PBGC nor the Treasury Department possessed unbridled freedom to develop the above regulations. In 29 U.S.C. § 1301(b)(1), Congress expressly directed the PBGC to model its regulations on those to be drafted by the Treasury Department to implement 26 U.S.C. § 414(c). In 26 U.S.C. § 414(c),[8] Congress directed the Secretary of the Trea-

[8] 26 U.S.C. § 414(c), one of the tax provisions enacted together with ERISA on September 2, 1974 (Pub. L. No. 93-406), provides, *inter alia*: "The Regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b)." (A-40).

sury to model its regulations on "principles *similar*" to those set forth in 26 U.S.C. § 414(b). (Emphasis added). In 26 U.S.C. § 414(b),[9] Congress itself designated 26 U.S.C. § 1563(a) as the model for ERISA-related tax regulations. (26 U.S.C. § 1563 was a 1964 Revenue Code provision relating to eligibility for surtax exemptions and is inapplicable to ERISA other than as a model.)

26 U.S.C. § 1563(a) defines three types of corporate controlled groups: (1) parent-subsidiary; (2) brother-sister; (3) combined controlled groups. (A-48—49). Membership in a group depends solely upon the ownership of a requisite percent of the voting power or value of applicable stock by shareholders or corporations related in a particular way. *See U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982). Ownership of the stock can be "direct" or "constructive"; and there is no requirement either of record ownership or of actual control by one company of the controlled company's operations.

As directed by Congress, the Treasury Department borrowed these "ownership principles" in promulgating Treas. Reg. § 11.414(c). With regard to corporations, the definitions of parent-subsidiary, brother-sister, and combined controlled groups are identical to those found in 1563(a). As in 1563(a), the existence of a group depends upon the direct or constructive ownership of a "controlling interest" (i.e., at least 80% of the voting power or value of stock) by shareholders or corporations related in a specific way. In addition, however, this regulation defines a "controlling interest" for unincorporated trades and businesses (i.e. sole proprietorships, partnerships, trusts and estates). For these entities, a "controlling interest" is defined as 80% (or more) of an equity interest equivalent to stock.[10]

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[9] 26 U.S.C. § 414(b), which is applicable solely to corporations and is narrower than 26 U.S.C. § 414(c) and 29 U.S.C. § 1301(b)(1), provides, *inter alia*: "[A]ll employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to 1563(a)(4) and (e)(3)(C)), shall be treated as employed by a single employer. (A-39—40).

[10] For unincorporated entities, a "controlling interest" is defined as ownership of an actuarial interest of *at least 80%* of an estate or trust; ownership of *at least 80%* of the profits or capital interests of a partnership; and ownership of a sole proprietorship. (Treas. Reg. § 11.414(c)-2(b)(2) (A-45)). In other words, Treas. Reg. § 11.414(c) clearly applies the "ownership principles" of 1563(a) to trades or businesses that do not have stock.

The Treasury Department was not directed to use as a model for § 11.414(c) any subsections of 26 U.S.C. § 1563 that are *not* expressly incorporated by reference into 1563(a). Accordingly, these other provisions, which are *not* applicable to ERISA, have been entirely omitted from Treas. Reg. § 11.414(c). Thus, for example, there is no requirement that the ownership interest be held for six months in a "tax year" (as in subsection "b" of 1563) and no rule giving "direct" ownership precedence over "constructive" ownership (as in 26 U.S.C. § 1563(f)(3)(B) as construed by Treas. Reg. § 1.1563-3(d), rules upon which the district court relied in excluding M-D and Tank Lines from the CenTra Group, thereby shielding Respondents from liability).[11]

Notwithstanding the plain language of 1301(b)(1), the promulgation of detailed Treasury Regulations defining corporate controlled groups, and the PBGC's unambiguous formal adoption of these Regulations, the district court found 26 U.S.C. § 1563 more "on point" because the Pension Fund's claim was based, specifically, on the ownership of "stock" whereas Treas. Reg. § 11.414(c) refers to the ownership of "controlling interests." (A-19). As noted above, the court relied not only on 1563(a), the conceded model for Treas. Reg. § 11.414(c); it relied on 1563 in its entirety.[12] Focusing on 1563(b) and (f), the court ruled that even

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[11] The intentional exclusion of these rules from Treas. Reg. § 11.414(c) is consistent with Proposed Treasury Regulation § 1.414(b)(1)(a), which was also promulgated in October 1975 (40 F.R. 51435). This Regulation provides:

> *Definition of Controlled Group of Corporations:* . . . For purposes of this section, the term "members of a controlled group" means two or more corporations connected through stock ownership described in section 1563(a)(1), (2) or (3), whether or not such corporations are "component members of a controlled group" within the meaning of section 1563(b). Two or more corporations are members of a controlled group at any time such corporations meet the requirements of section 1563(a) . . . . For purposes of this section, if a corporation is a member of more than than one controlled group of corporations, such corporation shall be treated as a member of each controlled group. (A-40).

[12] The court reasoned that since 26 U.S.C. § 414(c) incorporates 26 U.S.C. § 414(b), and since 414(b) refers to "1563(a) without regard to 1563(a)(4) and (e)(3)(C)," *all* of 1563 is applicable in determining whether a controlled group exists for purposes of ERISA. (A-18). This analysis was clearly erroneous and ignores the plain language of 26 U.S.C. § 414(b), which limits the relevance of 1563 to subsection "a" and any other subsections expressly incorporated by reference in subsection "a": to-wit, "(d)(1)" and "(2)" ("Rules for Determining Stock Ownership") and "(e)" ("Constructive Ownership"). (A-51—54). But for their express exclusion in 414(b), "(a)(4)" and "(e)(3)(C)" (relating,

if the Central Transport/M-D SPA was an "option," the M-D stock should be deemed owned by members of the King family, who were its "direct" owners on the date of withdrawal, rather than by Central Transport, the "constructive" owner.[13] In looking beyond 1563(a) to the "overlapping group" and "special rule" of 1563(b) and (f), the courts below created definitional precedent that conflicts with the rulings of the First and Third Circuits.

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respectively, to certain insurance companies and the attribution of stock owned by certain employee trusts) would have been incorporated by reference in 1563(a), thereby becoming part of the definitional model selected by Congress. To prevent this, Congress simply excluded them, thus limiting the scope of subsection "a." Contrary to the belief of the district court and the court of appeals, this exclusion was *not* evidence of Congressional intent to include everything else set forth in 1563. The significant fact, and the one disregarded by the courts below, is that *neither* 1563(a) *nor* the incorporated subsections (i.e. "d" and "e") incorporate 1563(b) or (f), which were necessary to the result reached by the district court. In sum, if one proceeds from 26 U.S.C. § 414(c) to 26 U.S.C. § 414(b) to 26 U.S.C. § 1563(a) and its incorporations, it is evident that the "component member," "overlapping group" and "special" rules of 1563(b) and (f) were intentionally excluded from the statutory model. Since these provisions were also excluded from Treas. Reg. § 11.414(c), it was particularly inappropriate to apply them. In so doing, the courts below have created a dangerous precedent for future application of 29 U.S.C. § 1301(b)(1) by obscuring the applicable rules for ascertaining the existence of a controlled group.

[13] The district court's application of the "Special Rule" was also erroneous on the merits. 26 U.S.C. §§ 1563(b)(4), 1563(f)(3)(B), and 26 C.F.R. § 1.1563-3(d) set forth rules to prevent a corporation from being part of more than one controlled group in any one tax year. Under these rules, stock is always deemed owned by the person whose ownership results in the corporation being the member of a controlled group. If two or more persons own the stock, it is deemed owned by the person whose ownership results in the corporation being part of a group *having at least one other component member on December 31 of the tax year*. If such ownership would result in its being part of two controlled groups on this date, the stock is deemed owned by the person who owns it directly. (A-54—57). This rule does not apply where an *entire* controlled group has been acquired—even constructively—by another controlled group since there is no remaining "component member" that was not subject to the acquisition. Nothing in the present record revealed that the Kings "directly" owned a controlled group consisting of entities in addition to Mason and Dixon, Tank Lines and The Crown Enterprises. These were all sold to Respondents on November 29, 1983. Hence, "two controlled groups" did not exist within the meaning of 1563(f)(3)(B) because there was not "at least one other component member" owned by the Kings after November 29. Thus, assuming *arguendo* that the "Special Rule" was relevant, the factual prerequisite for its application was absent. However, as noted above and will be discussed below, the result is particularly inimical to ERISA not because of this factual and legal error, but because the result required extending the reach of *1563(a)* to include a provision not intended to apply and for which no parallel exists in Treas. Reg. § 11.414(c).

PBGC v. Ouimet Corp., 630 F.2d 4 (1st Cir. 1980); 711 F.2d 1085 (1st Cir. 1983); *Dorn's Transportation v. Teamsters Pension Trust Fund*, 596 F. Supp. 350, 353 (D. N.J. 1984), *aff'd*, 787 F.2d 897 (3d Cir. 1986); *IUE AFL-CIO Pension Fund v. Barker and Williamson*, 788 F.2d 118 (3d Cir. 1986). *See also Central States, Southeast and Southwest Areas Pension Fund v. Pepsico*, 636 F. Supp. 641, 648, n. 11 (N.D. Ill. 1986).[14]

Barker and Williamson is particularly instructive. Here, the Third Circuit expressly rejected an employer's attempt to avoid a withdrawal liability assessment in reliance on 26 U.S.C. § 1563(b). 1563(b) provides that a corporation is "excluded" as the component member of any controlled group in which its membership existed for less than half the tax year. This exclusion permits the corporation to claim a separate surtax exemption. Finding the timing provision of 1563 irrelevant for any purpose of ERISA, the court of appeals stated that *only* those subsections of 1563 that are *expressly* incorporated in 1563(a) should be taken into account in determining the existence of a controlled group. 788 F.2d at 126, n. 4. In support of this conclusion, the court stated: "The literal statutory language [of 26 U.S.C. § 414(b)] referring only to § 1563(a) and not to 1563(b) is obvious recognition that subsection (b), requiring a six month control period, had meaning only for the purpose of computing corporate surtax exemptions under § 1561 and § 1562 of the Code." *Id.* at 126.

The Third Circuit's conclusion is supported not only by the express language of 26 U.S.C. § 414(b) and Proposed Treas. Reg. § 1.414(b)-1(a), which limit the relevance of § 1563 to subsection "a"; it is also consistent with Treas. Reg. § 11.414(c)-1, which provides, *inter alia*: "[A]ll employees of two or more trades or businesses under common control within the meaning of 11.414(c)-2 *for any period* shall be treated as employed by a single employer." (A-43—44, emphasis added). In contrast, the

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[14] These cases all make clear that the relevance of 1563 is limited to subsection "a." Since Treas. Reg. § 11.414(c)-(2) is identical to 1563(a), application of either provision leads to the same result, as the Third Circuit explains in *Barker and Williamson*. As noted above, definitional uncertainty arises where criteria are applied that exist *neither* in 1563(a) *nor* in Treas. Reg. § 11.414(c). The rulings of the lower courts open the door not only to application of the "special rule" of 1563(f) but to the more dangerous application of the six-month ownership requirement of 1563(b)(2), *infra*, p. 17.

Sixth Circuit's ruling, which affirms the district court's application of 1563 in its entirety, *would permit* an employer to rely on the six month "component member" requirement set forth in 1563(b). Thus, even if an employer immediately consummated a stock purchase agreement, took immediate title to the stock, and actually controlled the operations of the acquired company, it would still be shielded from an assessment predicated upon 29 U.S.C. § 1301(b)(1) for a full six-month period.

If the rulings below are permitted to stand and are followed in other jurisdictions, the existence of a controlled group for purposes of ERISA will be subject to different criteria depending upon whether its component members are corporations (defined in 26 U.S.C. § 1563 *and* Treas. Reg. § 11.414(c)) or unincorporated entities (defined only in Treas. Reg. § 11.414(c)). For example, a partnership formed at any time prior to a withdrawal will be part of a controlled group if the requisite ownership test is met; however, a corporation formed on the same date will be excluded if the ownership interest did not exist for six months.

Clearly, uniform rules applicable to all business entities and in all circuits are necessary for proper enforcement of Title IV of ERISA. Treas. Reg. § 11.414(c) contains all the necessary details for determining whether corporations as well as other forms of business are members of controlled groups. It must therefore be presumed that the qualifications set forth in 1563(b) and 1563(f) were intentionally (indeed, mandatorily) excluded. This Court's review of the Sixth Circuit's decision is necessary to make clear that Treas. Reg. § 11.414(c), having been formally adopted by the PBGC, provides the exclusive framework for determining the existence of a controlled group and that courts are not free to add to these rules by supplying criteria from other provisions of the Internal Revenue Code.

2. The courts' restrictive definition of an option conflicts with established contract law and the decisions of other circuits; a "present election" requirement will limit the constructive ownership basis of liability in regulated industries and invite conditional contracts in other industries for the purpose of avoiding an assessment predicated on 29 U.S.C. § 1301(b)(1)

For purposes of establishing a controlling ownership interest, Treas. Reg. § 11.414(c)-4(b)(1) provides:

> *Options*: If a person has an option to acquire any outstanding interest in an organization, such interest shall be considered as owned by such person. For this purpose, an option to acquire an option, and each one of a series of such options, shall be considered as an option to acquire such interest. (A-47).

(The model for this Regulation, 29 U.S.C. § 1563(e)(1), is almost identical. (A-52).) While constructive ownership plays a central role in establishing the existence of a controlled group, the term "option" is not defined in ERISA, the Internal Revenue Code, or in any applicable Regulation or Revenue Ruling.

Relying solely on an overruled and inapposite district court tax case, *Mid-America Industries v. U.S.*, 341 F. Supp. 597, 607 (D.C. Ark. 1972), *rev'd*, 477 F.2d 1029 (8th Cir. 1973),[15] and Revenue Ruling 68-601 relating to Sections 302 and 318 of the Internal Revenue Code (A-115—117), the district court held that the Central Transport/M-D SPA was not an "option" because its consummation was subject to the "contingency" of ICC approval and this "contingency" was beyond the purchaser's control. Quoting with approval language (from the above authorities) that transcends the particularities of contracts requiring regulatory consent, the court indicated that "to constitute an option to purchase stock, the rights in question must enable the

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[15] *Mid-America* was an action for the recovery of taxes paid under protest by a parent and each of its 15 subsidiaries whose claims for separate surtax exemptions had been disallowed on the grounds that they were all members of a controlled group within the meaning of 26 U.S.C. § 1563. The precise issue involved was whether a "condition" restricting the transfer of employee-held stock "ran in favor" of the parent corporation and, under 26 U.S.C. § 1563(c)(2)(A)(iii), should have been excluded in determining whether the parent owned at least 80% of the stock of the subsidiaries.

holder to purchase the stock 'presently at his election.'" (A-20).[16]

The district court's overly-restrictive definition of option conflicts with established contract law, subsequent developments in tax law, decisions of other circuits, and the realities of business. As the Sixth Circuit itself recognized in a case involving a sale of assets subject to the 1984 DEFRA amendments to MPPAA (Section 558, Pub. L. No. 98-369), "[m]ost complex commercial transactions are not simple, one-step transfers but multi-step arrangements beginning with an agreement and ending with a final closing, often much later." *Central States, Southeast and Southwest Areas Pension Fund v. 888 Corporation*, 813 F.2d 760, 765 (6th Cir. 1987). A "present election" requirement not only threatens to erode the constructive ownership basis of liability in regulated industries where approval is always required as a step toward closing; it invites all purchasers of stock (or equivalent equity interests) to couch their agreements in conditional language in an effort to avoid the application of 29 U.S.C. § 1301(b)(1) should a withdrawal or plan termination occur prior to consummation of the contract. Since any condition or contingency, however insubstantial, could literally preclude "present election" and hence the existence of an option, the constructive ownership basis of "control" would quickly evaporate, a result clearly contrary to Congressional intent.[17]

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[16] The question presented in Rev. Ruling 68-601 was whether warrants and convertible debentures are options within the meaning of Sections 302(b)(2) and 318(a)(4) of the Internal Revenue Code, which relate to the tax treatment of certain stock redemptions. In effect, the more liberally the option rule of 318 is construed, the more difficult it is for a shareholder to obtain favorable tax treatment under 302, which is the result intended. In a subsequent General Counsel Memorandum (35176, December 19, 1972), the IRS noted that the "status" of Rev. Ruling 68-601 is "uncertain" (A-118—128) and that neither the passage of time nor insubstantial contingencies would preclude the existence of an option: "for section 318(a)(4) to be inapplicable, the contingencies with respect to the election must be *serious precedent conditions beyond the control of the taxpayer which could result in a substantial risk of forfeiture.*" (A-119, emphasis added). This is also the position of the ABA Committee on Affiliated and Related Corporations, 21 Tax Lawyer 921 (1968).

[17] Congress clearly intended to pierce the corporate veil by enacting 29 U.S.C. § 1301(b)(1). *Central States, et al. v. Pepsico*, 636 F. Supp. 641, 658-59 (N.D. Ill. 1986); *PBGC v. Anthony*, 537 F. Supp. 1048, 1052-55 (N.D. Ill. 1982). Hence, the interests Congress sought to protect are not accommodated by restricting the criteria selected to establish the existence of a controlled group

a. The lower courts' restrictive definition of an option conflicts with established contract law; the essence of an option contract is that it contains an irrevocable offer

A determination whether a particular instrument should be characterized as an "option" is fundamentally a matter of contract not tax law.[18] *Schweiger v. Iowa Beef Processors, Inc.*, 802 F.2d 1032, 1035 (8th Cir. 1986). This is also the view of the Third Circuit, which construed the term "option" specifically for purposes of applying 29 U.S.C. § 1301(b)(1) to a withdrawal liability assessment. *IUE AFL-CIO Pension Fund v. Barker and Williamson*, 788 F.2d 118, 124 (3d Cir. 1986).

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and diluting the possibilities for constructive ownership. Rather, the burden should be placed on the purchasers and sellers of businesses maintaining or contributing to pension plans to factor potential liability into the purchase price (subject to adjustments) and to further protect themselves through indemnification agreements. In the case at bar, Central Transport demanded an "accrual" for withdrawal liability (SPA Para. 2.2.5, A-76) which would have affected a determination of the book value of M-D's stock and thus the purchase price (SPA ¶ 2.0, A-73—76). A lawsuit resulted (Jt. App. 106-09) and the purchase of Mason and Dixon was effected through a settlement. Withdrawal liability was admittedly a factor in determining the ultimate purchase price. (Dep. of J. Argabrite). The SPA also contained an indemnification clause (SPA, ¶. 19, A-100—101).

[18] Even for tax purposes, options are contracts. Moreover, there are no consistent tax law principles to apply. A Westlaw search reveals that the term "option" appears in 66 different provisions of the Internal Revenue Code (A-129) and is nowhere defined. Existing commentary suggests, however, that a uniform tax definition of "option" would not be feasible or appropriate since the scope and effect of constructive ownership under the Internal Revenue Code differs depending upon the particular purpose of the Code provision in which it appears. *See* G. Winston, *Attribution of Stock Ownership from Stock Options under the Internal Revenue Code*, 44 Univ. of Chicago L.R. 482, 483 (1977). For purposes of ERISA, a single definition *is* necessary and one that is liberal in order to accommodate the remedial purposes of the statute. *See PBGC v. Center City Motors*, 609 F. Supp. 409 (S.D. Cal. 1984) and *United Food and Commercial Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633 (D. N.J. 1986), in which the courts abandoned the many and various Code interpretations of "trade or business" in favor of a "liberal" ERISA definition to implement 29 U.S.C. § 1301(b)(1). *See also United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983), in which the court rejected tax principles in favor of contract rules to define the meaning of "plan termination." In *Schweiger v. Iowa Beef Processors* (a case involving the enforcement of employee stock options), the Eighth Circuit stated: "An option is subject to the same rules of interpretation as an ordinary contract. . . . An option is a continuing offer which may not be withdrawn prior to its expiration date for the reason that the promise is based on a consideration." 802 F.2d 1032, 1035 (8th Cir. 1986).

In *Barker and Williamson*, the issue before the court was whether a controlled group existed on the date of withdrawal by virtue of an oral agreement to purchase and sell stock. At the outset of its analysis, the court enunciated both its task and the relevant test:

> Because ERISA does not define "option," we must borrow from traditional common law to develop the necessary federal common law for interpreting the statutory language. (citations omitted). Our reliance on such common law, however, must be consistent with ERISA's and the MPPAA's provisions and underlying policies.... A common-sense reading of the statute indicates that in incorporating the revenue code's common control provisions into the MPPAA, Congress was more concerned with the degree of control exercised over the corporation involved than with precisely classifying any particular agreement as an option. We must therefore *determine if the agreement . . . conferred . . . at least that degree of control over the shares involved that an option would confer.*

Id. at 124, emphasis added. After evaluating the SPA under principles set forth in the *Restatement (Second) Contracts*, the court determined that the policies underlying ERISA would be promoted by characterizing the contract as an option, thereby permitting the pension fund to recover withdrawal liability from the controlled group rather than leaving it with recourse solely to the insolvent seller (the company which effected the withdrawal).

The *Restatement (Second) Contracts* § 25 defines an option contract as a "promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." The requirements for "formation" are a "bargain in which there was manifestation of mutual assent to the exchange, and a consideration." Comment (d) to Section 25 states: the "principal legal consequence of an option contract is that . . . it limits the promisor's power to revoke the offer." As the record reveals, the Central Transport/M-D SPA satisfied these criteria: the preamble recited the parties' "mutual assent" to the bargain; only a single condition precedent to the formation of the contract existed (the GLS LeasCo purchase of Crown), and this was satisfied; the contract was supported by $100,000 consideration,

termed a "nonrefundable deposit"; in return, Transport obtained immediate and substantial benefits.

With regard to the most important characteristic of an option, M-D was not contractually empowered to revoke the offer—even if regulatory approval was denied. In contrast, Central Transport had a present, continuing, and exclusive right to exclude any other purchaser from acquiring the stock of M-D and Tank Lines "by option, subscription, contract or otherwise" (¶ 3.4, A-77—78). Moreover, Transport was not contractually obligated to consummate the purchase itself: ¶ 8.2 of the SPA gave Central Transport a complete and unconditional right to assign all or any part of the contract (with or without receipt of regulatory approval) to an assignee of its own choosing, indeed, to a purchaser to whom M-D could not even object. This is very significant because not all purchases are subject to ICC approval. Hence, Transport at all times had the power to moot the ICC contingency simply by assigning its interest to a non-carrier who could (and was contractually required to) consummate the transaction within 60 days.(¶ 8.2, A-87—88). Similarly, Transport alone had the power to "elect" to pursue appeals of an adverse final decision (¶ 8.1, A-87) and, in the unlikely event its application for approval was deficient, to effect a cure consonant with regulatory requirements.

In sum, the SPA (like many options) gave the parties time in which to complete the requisite paperwork, get the needed authority, and obtain financing. I Williston, *Contracts* § 61D (3d ed.), p. 205. The decisions of the lower courts conflict with the authorities cited above and are inconsistent with business reality. As in ***Barker and Williamson, supra***, the SPA gave Central Transport "at least that degree of control over the shares"[19] of M-

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[19] The SPA was a hybrid. With regard to the limitations on Mason and Dixon's power to revoke the offer, the contract was a true option on the date of execution, which Central Transport exercised by applying for ICC authority. On the other hand, Central Transport was bound to consummate or assign the contract, and also enjoyed substantial benefits as of the date of its execution. Hence, the contract was more than an option. Indeed, in that M-D contractually relinquished its right to vote its stock and declare dividends, it immediately relinquished the basic indicia of "direct" ownership which passed to Central Transport long before the SPA was consummated. In any event, if an option that need never be exercised confers constructive ownership, a comprehensive SPA, supported by substantial consideration and conferring immediate benefits on the

D and Tank Lines "that an option would confer". Hence, Respondents were clearly the "employer" for purposes of the Fund's assessment.

b. The need for ICC approval did not derogate from the irrevocable nature of the offer and the lower courts' inclusion of a "present election" requirement conflicts with the decisions of other courts

ICC approval was undisputedly necessary for consummation of the SPA by Central Transport (49 U.S.C. § 11343, A-57—60). However, a contingency to closing should not be regarded as a bar to characterizing a SPA as an option if the criteria for proper formation have been satisfied. As noted above, the significant characteristic of an option is that the optionor is bound to perform while the optionee is not required to exercise the option and may never do so. Moreover, the constructive ownership rule contemplated by ERISA encompasses not merely an "option" but an "option to acquire an option" or any "series" of such options. This indicates that even a very attenuated link between an irrevocable "right" to acquire an ownership interest (the possession of which is dispositive) and the "exercise" of the right (which may never occur) is sufficient to establish a controlled group relationship.

Contracts very similar to the Central Transport/M-D SPA have been construed as options, notwithstanding the fact that ICC approval was required before the agreements could be consummated. In *Byers Transportation Co. v. Fourth National Bank & Trust, Wichita*, 333 F.2d 822 (8th Cir. 1964), a SPA whose consummation was expressly contingent upon ICC approval was construed as giving the purchaser the "option" to terminate the contract if approval was not granted without modification. In *DeTar Distributing Co. v. Tri-State Motor Transit Co.*, 379 F.2d 244 (10th Cir. 1967), a SPA which the parties themselves characterized as an "option" was held to be specifically enforceable as of the date of its execution, although the purchase price was dependent upon whether the ICC converted "contract carrier" authority into "common carrier" authority and although

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purchaser, should have *at least* this result. Indeed, the more subtle issue is not whether Central Transport acquired constructive ownership or nothing pending ICC approval, but whether the SPA created "constructive" or "direct" ownership.

ICC approval of the transfer was necessary before the purchaser was obligated to tender the purchase price.

In *Smith v. Delta Express*, 365 So.2d 1345 (S. Ct. La. 1978), the court explained that operating rights issued by the ICC are property which, if transferred by contract, pass title to the transferee even though the ability to use these rights depends upon ICC approval. In *Lennon v. Habit*, 4 S.E.2d 339 (S. Ct. N.C. 1939), an old but frequently cited case, the court stated that where actual performance of a contract depends upon regulatory commission approval, notice of intent to exercise an option is sufficient to make a binding contract of purchase and sale whose terms are cognizable by a court. As the Eighth Circuit stated in *Watson Brothers Transportation Co. v. Jaffa*, 143 F.2d 340, 346 (8th Cir. 1944): "a man's obligation under his lawful contract is not a whit less binding upon him because of the fact that an approval of the transaction must be had before the party to whom he has obligated himself can receive full benefits." The court thus held that a contract involving the lease of and option to purchase certain trucking routes was specifically enforceable although ICC applications had not yet been filed due to the seller's desire to avoid the contract and lack of cooperation.

The essence of these cases is that contracts subject to ICC approval are binding agreements giving the purchaser exclusive and specifically enforceable rights as of the date of their execution. (Indeed, this view is necessary to permit the purchaser to compel the seller to produce documents and otherwise cooperate in obtaining regulatory approval.) Regulatory approval is viewed not as a contingency precluding the existence of an option but as a duration term of the contract. If and when regulatory approval is given, the purchaser is bound to complete performance by paying the promised purchase price. If approval is not given, the purchaser may treat the option as expired. Clearly, this view of the legal effect of regulatory approval is more accurate than the view posited by the courts below, and one that better accords with business reality and the parties' expectations with regard to the certainty of their contracts.

Options are also recognized in other areas of commerce even though "present election" is impossible. For example, pursuant to their charter or by-laws, corporate employers frequently possess an option to purchase employee-held stock upon the happening of

contingencies beyond the company's control, i.e. the employee's death or voluntary termination. *St. Louis Union Trust Co. v. Merrill Lynch Pierce Fenner & Smith*, 562 F.2d 1040, 1044-47 (8th Cir. 1977); *The Toledo Trust Co. v. Nye*, 588 F.2d 202, 207-210 (6th Cir. 1978); *DeVries v. Westgren*, 446 Pa. 205 (S. Ct. Pa. 1971). In characterizing such arrangements as options, courts focus on the fact that the employee has no choice *but* to offer the stock to the company or to existing shareholders before offering it to the public.[20]

In *Turzillo v. C.I.R.*, 346 F.2d 884, 888-89 (6th Cir. 1965), a tax case, the Sixth Circuit held that monies received in settlement of a breach of contract action could be treated as a capital gain although the taxpayer's claims had arisen out of employment and stock option contracts which were all subject to contingencies beyond his control. Rejecting the Commissioner's view that the recovery should be taxed as ordinary income in view of these contingencies, the court ruled that the "uncertainties and contingencies" affected only the "value" of the contract right conferred but not the existence of the right itself which, since it could "possibly" have resulted in the taxpayer's acquisition of a half-ownership in the employer company, was properly treatable as a capital asset.

Finally, the "present election" requirement is irreconcilable with the fact that option contracts abound in transactions involving the purchase and sale of real property where consummation is

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[20] *DeVries* is particularly instructive. Here, an employee executed a stock purchase agreement requiring him to offer his shares to the remaining shareholders upon termination of his employment. After filing a bill for specific performance, thereby exercising the option, the shareholders wished to get out of the agreement because the contract price to which they were bound far exceeded the current value of the shares. The Supreme Court of Pennsylvania ruled in favor of the employee after first determining that the stock purchase agreement, although not technically an option, should be treated as such:

> [U]nlike a right of first refusal, whereby the appellant could elect to retain his shares and never sell to anyone, the stock purchase agreement requires appellant to offer his shares to the remaining shareholders upon the termination of his employment. In our view, *the requirement that appellant offer his shares, whether or not he wished to retain them, lends a quality of irrevocability to the stock purchase agreement and justifies our treatment of this agreement as an option contract.* (emphasis added).

Clearly, the Central Transport/M-D SPA had the same quality of "irrevocability" and should be treated as an option for purposes of Treas. Reg. § 11.414(c).

normally dependent upon the purchaser's obtaining a mortgage from a lending institution whose approval, like that of the ICC, represents a contingency beyond the purchaser's control. *Harper v. Gibson*, 325 S.E.2d 586 (Ct. App. S.C. 1985).

c. The lower courts' per se adoption of a "present election" requirement threatens to erode the reach of 29 U.S.C. § 1301(b)(1) in the trucking and other regulated industries without due regard for the substantiality of the contingency or the objectives to be served by competing regulatory schemes

Even if a contingency might be so significant as to render a contract not an option, the contingency of ICC approval does not rise to this level, particularly since the trucking industry was deregulated by the Motor Carrier Act of 1980 (49 U.S.C. § 10101, *et seq.*) precisely in order to ease entry and promote competition.

An "Initial Report of the Motor Carrier Task Force" to the chairman of the ICC (dated May, 1979)—recommending deregulation—stated: "Perhaps the most perceptible change in Commission policy has been the accelerated trend in granting applications for operating authority. . . . Currently, the Commission is granting over 95% of these applications." Similarly, a 1980 Senate Report (accompanying the Motor Carrier Act of 1980) stated that the ICC "now grants approximately 96.7% of the applications for operating rights." (S. Rept. No. 96-641 (1980), 96th Cong., 2d Sess., p. 6). In 1984, the ICC specifically exempted transactions of the type at bar from the approval requirements of 49 U.S.C. §11343, §11344 and § 11345(a), substantially simplifying the application process and expediting the transfer of operating rights and property. 49 C.F.R. § 1186 (49 F.R. 48314, Nov. 21, 1984) (A-60—64). Given the extent of deregulation,[21] ICC approval should not be regarded as a contin-

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[21]See *BHY-Trucking Inc.—Purchase (Partial)—Roadway Express, Inc.*, 127 M.C.C. 731, 733 (1980): "The enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-269, 94 Stat. 793, resulted in a fundamental change in the standards for decisions in cases involving motor carrier entry. It is now considerably easier, and quicker, for new trucking companies to obtain authority and for existing companies to expand their operations. . . . With eased entry and the present quick Commission licensing procedure, carriers are able to obtain authority and commence operations almost immediately."

gency that precludes the existence of constructive ownership under Treas. Reg. § 11. 414(c), particularly where the parties to the SPA themselves assumed the risk of an adverse decision.

M-D was incorporated as a carrier in 1934; Respondents form one of the largest and most sophisticated trucking conglomerates in the United States. Both parties can be regarded as knowledgeable in trucking industry practice. The terms of the SPA clearly reveal that neither Central Transport nor M-D seriously believed that the ICC would deny permanent authority. Thus, M-D ceded numerous rights to Transport as of the date the contract was executed; in return, Transport agreed to characterize the $100,000 consideration as a nonrefundable deposit toward the purchase price of M-D. The parties' certainty was borne out: Transport obtained temporary authority within two weeks and permanent authority within three months of applying.

In sum, ICC approval was not a substantial contingency and should not be construed as an obstacle preventing the enforcement of 29 U.S.C. § 1301(b)(1), particularly since declaring Central Transport the constructive owner of M-D and Tank Lines for purposes of ERISA in no way undermines or conflicts with the purposes or policies of the Motor Carrier Act of 1980.

By regarding "present election" *per se* as a necessary element of the definition of an option, the courts below have seriously diluted the effect of Treas. Reg. § 11.414(c)-4(b)(1) and accorded employers in regulated industries substantial immunity from the reach of 29 U.S.C. § 1301(b)(1) and hence a substantial benefit they would not enjoy but for such regulation.[22] If the decisions of the lower courts are left to stand, however, the term "option" will have a narrower meaning for Treas. Reg. § 11.414(c) than ordinary usage of the term suggests, and a "regulated industry" gloss will have been added, which Congress did not intend, which is harmful both to multiemployer funds and the PBGC, and which will not enhance the primary purposes for which certain industries are regulated: the promotion of safety, the discouragement of monopolies, and the supervision of rates.

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[22]Regulatory approval is required in numerous important industries besides transportation, for example, communications, banking and utilities.

In sum, this Court should review the Sixth Circuit's ruling to make clear that Treas. Reg. § 11.414(c) should be applied without regard to the contingency of regulatory approval unless the employer can show that the contingency involves a substantial risk of forfeiture and that the policies underlying a particular regulatory scheme will be frustrated by deeming a particular purchaser a constructive owner for purposes of ERISA.

3. The lower courts' operational control requirement conflicts with decisions of this and other courts, lacks standards, and invites both abuse and litigation

The courts below expressed the belief that actual operational control is a factor to be considered in establishing the existence of a controlled group. (A-6—7, A-22, A-30). This requirement disregards the plain language of Treas. Reg. § 11.414(c) and 26 U.S.C. § 1563(a), which predicate the existence of a controlled group *solely* on the basis of an objective ownership test; i.e. a "mechanical formula." *See U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 33-34 (1982, analyzing 26 U.S.C. § 1563(a) and its corresponding regulation defining a brother-sister controlled group).

The view that operational control is a prerequisite to application of 29 U.S.C. § 1301(b)(1) is fatally inconsistent with the constructive ownership basis of control, in which an "option" or an "option to acquire an option" or any "series" of such options are deemed actual ownership both under Treas. Reg. § 11.414(c) and 26 U.S.C. § 1563(a). Since options need never be exercised, optionees may never exercise operational control; if and when they do, they may no longer be "constructive" owners. If operational control is accepted as a prerequisite for liability, the option rule (as well as other attribution rules) will be rendered nugatory.

At a minimum, employers engaged in regulated industries will enjoy presumptive immunity from the reach of 29 U.S.C. § 1301(b)(1) pending the receipt of temporary authority. If operational control is necessary, constructive ownership simply cannot exist between the date a purchase agreement is executed and the date temporary authority is received, no matter how much "control over the shares" the contract may confer. Moreover, operational control can exist in disguised form pending the receipt of temporary authority, which the purchaser can himself delay. In the interim, a court may well find the apparent exercise

of control nothing more than the purchaser's efforts to maintain the status quo and preserve the benefit of the bargain, as in the case at bar. (A-6).

A final problem with the operational control requirement is that there are no standards for measuring such a criterion. Thus, once the objective ownership test selected by Congress, the Treasury Department, and the PBGC is abandoned, litigation can be expected on the issue of how much and what kind of operational control is necessary before 29 U.S.C. § 1301(b)(1) is applicable. Indeed, litigation can be expected whenever a plan sponsor or the PBGC makes an assessment predicated on the existence of a controlled group, particularly where the group's component members are engaged in quite dissimilar trades or businesses (which is very common). This result obviously subverts the policies and purposes of ERISA and is inconsistent with *U.S. v. Vogel Fertilizer, supra*, and *Barker and Williamson, supra*, both of which measure control solely in terms of the ownership of stock.[23]

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[23] A conflict actually exists in the Sixth Circuit. In *In re Challenge Stamping and Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983), the court acknowledged that Congress intended to establish control on the basis of a "bright-line" ownership test. However, given the "unique" facts of the case, the court refused to apply 1301(b)(1) and to hold the purchaser of a bankrupt company jointly and severally liable to the PBGC for plan termination liability. The court reasoned that the bankruptcy court had precluded the purchaser from exercising any degree of control over the operations of the acquired company by authorizing a sale of its assets to someone else. Thus, the purchaser held only worthless stock (for which it had paid only a dollar); moreover, the plan had terminated within days of the acquisition. The court cautiously limited its holding to the peculiar facts of the case, refusing to create a per se operational control rule even for all bankruptcies. In *Central Transport*, however, the reach of *Challenge Stamping* has been enhanced, although an equitable departure from MPPAA was not supported by the facts. Although *Challenge Stamping* has not previously been followed, there is every danger that operational control will now be widely argued as a dispositive criterion of liability.

CONCLUSION

Prior to 1986, employers routinely challenged withdrawal liability assessments by asserting that MPPAA was unconstitutional. As a result of this Court's decisions in *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *Connolly v. PBGC*, 475 U.S. 211, (1986), this issue has been largely laid to rest. Now, employers anxious to avoid an assessment argue that they are not employers. 29 U.S.C. § 1301(b)(1) provides the only definition of "employer" specifically directed to the enforcement of Title IV of ERISA. As a result of the Sixth Circuit's decision, which conflicts with decisions of other court of appeals, the rules for establishing the existence of a controlled group and hence for applying 29 U.S.C. § 1301(b)(1) have become unsettled, making it impossible for plan trustees and the PBGC to identify an employer and thus to calculate and collect withdrawal and plan termination liability without the expectation of intensified litigation. For all of the reasons stated above, this Court should grant this Petition and issue a Writ of Certiorari to assure that uniform rules will henceforth apply in establishing the existence of a controlled group.

Respectfully submitted,

Russell N. Luplow

Diana L.S. Peters

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

APPENDIX

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APPENDIX A

Memorandum and Order of the District Court, January 17, 1986

Appendix A

(FILED JAN. 17, 1986)
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

CENTRAL TRANSPORT, INC., *ET AL.*

v. NO. CIV-2-85-470

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *ET AL.*

and

THE MASON AND DIXON TANK LINES, INC.

v. NO. CIV-2-85-471

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *ET AL.*

and

MICHIANA TRUCKING, INC., *ET AL.*

v. NO. CIV-2-85-472

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *ET AL.*

MEMORANDUM

This action came before the Court for a hearing on plaintiff's motion for a preliminary injunction. Plaintiffs seek protection in this action from imposition of a Twenty-six ($26) million dollar withdrawal liability assessment by defendant, based on the withdrawn participation from the union pension plan of a single

bargaining unit within Mason & Dixon Tank Lines which resulted from this bargaining unit's decertification of the union.

The court has carefully considered the record and the oral arguments made by counsel and will issue a preliminary injunction for the reasons set forth below.

Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. No. 96-364, Congress empowered multiemployer pension funds to assess "withdrawal liability" on an employer withdrawing from participation in the fund. The Pension Fund (Fund) is able to assess withdrawal liability against an employer when there is a partial withdrawal of participation. 29 U.S.C §1381. Under the statutory scheme, a partial withdrawal occurs when "the employer permanently ceases to have an obligation to contribute [to the Fund] under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute . . . . " 29 U.S.C §1385 (b) (2) (A) (i).

The calculation of "withdrawal liability" which is assessed based upon a partial withdrawal, is not limited to the unfunded vested benefits of the employees that precipitated the partial withdrawal, but allows the fund to include in this calculation other unfunded vested benefits, related to the employer, for which the Fund would not otherwise be allowed to assess.

In the present case, Mason & Dixon Tank Lines (Tank Lines) ceased to have an obligation to make Fund contributions on behalf of the employees within the bargaining unit which decertified the union. This particular bargaining unit of Tank Lines is made up of five employees. These five employees voted the union out on November 29, 1983, and terminated their status under union contracts on December 31, 1983. The Fund has asserted withdrawal liability, based upon this triggering event (the withdrawal of the Tank Lines bargaining unit), against some twenty other businesses that are allegedly part of a group of

businesses, including Tank Lines, that are under common control. The statute provides that all employees of trades or businesses which are under common control will be treated as if they were employees of a single employer with all of the commonly controlled businesses making up the single employer. 29 U.S.C. §1301 (b) (1). Since this "Control Group" is the "employer" under the statute, withdrawal liability is calculated based upon the contribution history of all members of the "Control Group", and this is how the Fund arrived at the $26 million figure for which it seeks to hold each member of the alleged Control Group jointly and severally liable.

Plaintiffs in this action have disputed this assessment of withdrawal liability; and, under the statute, disputes over withdrawal liability are resolved by arbitration.[1] 29 U.S.C. §1401 (a) (1). The statute also provides that the Fund may schedule payments on the withdrawal liability, and that the employer is required to make such payments pending the resolution of any dispute over the liability. 29 U.S.C. §1401 (d). In this action the Fund is seeking an order compelling the plaintiffs to make interim monthly payments of $548,571.67. Plaintiffs seek a preliminary injunction to prohibit defendant from attempting to collect the withdrawal liability alleged to be due and owing until the plaintiffs' liability in this matter is established.

In making the determination as to whether a preliminary injunction should issue, the Court is directed to consider four factors:

1. Whether there is a substantial likelihood of success on the merits;

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[1] As is subsequently discussed in this Memorandum, the Court has found that arbitration is not a jurisdictional prerequisite to the maintenance of this action.

2. Whether the moving party will be irreparably damaged if the injunction is not issued;

3. Whether issuance of the injunction would cause substantial harm to others; and

4. Whether the public interest would best be served by the issuance of the preliminary injunction. *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982).

As to the first factor, the Court finds that plaintiffs have demonstrated a substantial likelihood of success on the merits. This determination is based primarily upon the issue of whether Tank Lines was part of the Control Group at the time of withdrawal from the Fund by the five employees. The critical date here is December 31, 1983, the date the five-member collective bargaining unit ceased to operate under union contract. If Tank Lines was under the control of plaintiff, Central Transport, Inc., at that time, then Tank Lines was part of the alleged Control Group, and the withdrawal liability asserted by the Fund would stand on a much stronger factual basis. However, although Central Transport had entered into an agreement for the purchase of Mason & Dixon Lines, Inc., the parent of Tank Lines, this agreement was subject to approval by the I.C.C. It is beyond dispute that the agreement did not receive final approval by the I.C.C. until early 1984, and Central Transport did not become the actual owner of Mason Dixon's stock until February, 1985.

Defendant asserts, however, that even though Central Transport was prohibited from owning Tank Lines until 1984, a date subsequent to the alleged triggering event, it nevertheless exercised control over Tank Lines prior thereto. Thus, defendant argues, Tank Lines was part of the Control Group prior to the triggering event which prompted this withdrawal liability assessment. Unfortunately for defendant, two factors militate heavily against their theory of "control" by Central Transport.

First, the Interstate Commerce Act prohibits the exercise of any control by the acquiring corporation prior to the issuance of preliminary I.C.C. approval. 49 U.S.C. §11343, 49 U.S.C §11349. The I.C.C. decision which allowed Central Transport to begin to exercise control over Mason Dixon and Tank Lines pending a final decision by the I.C.C., was not served until January 4, 1986. Thus, Central Transport was prohibited by law from exercising any control over Tank Lines prior to January 4, 1986. The Sixth Circuit has indicated that withdrawal liability will not be enforced against the purchaser of a corporation when its operation was beyond the purchaser's control. *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983).

Second, defendant is unable to point to any evidence which would support its contention that Central Transport was in control of Tank Lines as of December 31, 1983. Defendant points to provisions in the purchase agreement which limit the actions that may be taken by Mason Dixon and Tank Lines from the date of execution of the agreement until the date Central Transport is given approval to exercise control. Paragraph 11, Stock Purchase Agreement.[2] These provisions, however, merely prevent Mason Dixon and Tank Lines from depriving Central Transport of the benefit of its bargain by requiring maintenance of the status quo. Included are provisions such as: the equipment will be maintained ¶11.3, the capital structure will not be altered ¶11.5.6, etc., and Central Transport is allowed to inspect and make certain that such changes are not occurring. The Court is unable to find any delegation of control to Central Transport in these provisions.

Central Transport did not acquire Mason Dixon's stock until February, 1985, and it does not appear that they manifested any control over Mason Dixon or Tank Lines prior to January 4, 1984. In fact, Central Transport was prohibited from exercising control

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[2] The Stock Purchase Agreement is found as Exhibit B to Central Transport's brief in support of motion for a preliminary injunction.

prior to January 4, 1984 by the I.C.C. Therefore, it appears that Tank Lines was not part of the alleged Control Group at the time of withdrawal. If Tank Lines was not part of the Control Group, the withdrawal liability which might be assessed by the Fund would be *de minimus*.[3] Since the withdrawl liability asserted by the Fund appears to be based on an erroneous conclusion, plaintiffs have demonstrated a substantial likelihood of success on the merits.

The Court also finds that plaintiffs will be irreparably damaged if an injunction is not issued. Plaintiffs have asserted that the imposition of such a liability would basically force all businesses concerned to shut down and liquidate. Although such drastic results are not certain, it is certain that the existence of a non-contingent[4] $26 million liability will impair the credit of each of the plaintiff companies, as well as their customer confidence.[5] Such an impairment will inhibit the ability of these businesses to operate, and may indeed result in their demise, even though the Fund's assessment may be wrong. Destruction of the plaintiffs as going concerns is irreparable damage.

On the other hand, the Fund would not be impaired by the issuance of the preliminary injunction. Its existence is not threatened by the delay in collecting the withdrawal liability.

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[3] Counsel for defendant intimated at oral argument that if withdrawal liability were limited to Tank Lines, the Fund would probably not pursue its collection.

[4] The statute provides that the withdrawal liability determination by the Fund is presumed proper. 29 U.S.C. §1401 (a) (3) (A). It is on this basis that the fund is able to compel payment of the withdrawal liability even though arbitration of such a determination is pending. 29 U.S.C. §1401 (d).

[5] The United States District Court for the Eastern District of New York found irreparable damage in the assessment of withdrawal liability. "Such a claim, whether valid or not, sends a signal to people in the industry that the company in question is out of business." *Time-DC, Inc.*, v. *Trucking Employees of North Jersey Welfare Fund*, 560 F. Supp. 294, 304 (E.D.N.Y. 1983).

Counsel for plaintiffs has asserted that the Fund's 1984 Annual Report reveals surplus income of $386 million out of total income of $2.058 billion. This assertion was not contradicted at the hearing by defendant. It is apparent, therefore, that the fund faces no threat from delay in collecting what will, at most, be a $26 million assessment. This is actually only a small portion of the Fund's total income, and enjoining its collection will not prevent the payment of any vested pension obligations, particularly when one considers that it was to be paid in monthly installments of approximately $500,000.00 over a period of years. Thus, the Court finds that issuance of the injunction will not cause substantial harm to others.

Finally, although the public interest does not form a substantial portion of the basis for this decision, the Court does find that the public interest would best be served by enjoining the enforcement of this withdrawal liability. It is in the public interest to protect the viability of private businesses when the protection will not prejudice other parties, and when the threat to their viability rests upon questionable grounds.

Accordingly, the defendant will be enjoined from pursuing collection of the $26 million withdrawal liability from any of the plaintiffs.

The plaintiffs also seek a preliminary injunction to prohibit the defendants from commencing an arbitration proceeding pursuant to the provisions of 29 U.S.C. §1401(a)(1) against the plaintiffs. Although defendants argue that arbitration is the proper method to resolve this dispute over the payment of withdrawal liability which defendants have assessed against the plaintiff, the exhaustion of an arbitration process is not a prerequisite to district court jurisdiction.

The issue of requiring arbitration as a prerequisite has been addressed in *I.A.M. National Pension Fund Benefit Plan C* v. *Stockton Tri Industries*, 727 F.2d 1204 (D.C. Cir. 1984), which

involved an action brought by a pension fund to collect withdrawal liability under the Multiemployer Pension Plan Amendment Act of 1980. After finding that exhaustion of the arbitration process was not a jurisdictional prerequisite, the Court in *Stockton, supra* at 1209-1210, then found that as a prudential matter it was also proper for the district court to proceed on the merits for two reasons.

First, the court found that it was proper for the district court to proceed on the merits, because the issue before the court was "purely one of statutory interpretation." *Stockton, supra* at 1210. Although the facts in *Stockton* were undisputed, the legal significance of those facts was hotly disputed. In this respect, the case at bar is similar to *Stockton,* because in both cases the interpretation of a critical statutory provision in regard to certain undisputed facts will determine whether or not withdrawal liability exists. Whereas the pivotal statutory term in *Stockton, supra* at 1205, was "complete withdrawal", in the case at bar, the Court must look at the terms "employer" and "controlling group".

Second, in *Stockton,* the court looked at the likelihood that requiring arbitration would promote judicial economy by resolving the dispute extrajudicially. The Court found in *Stockton, supra* at 1210, that under the specific circumstances present there, it was "unlikely in the extreme" that arbitration would resolve the dispute. In the case at bar, because the plaintiff, Central Transport, Inc., insists they have no withdrawal liability; and the plaintiff, Mason and Dixon Tank Lines, Inc., only admits a *de minimus* withdrawal liability, while the defendants claim withdrawal liability of $26,295,533.25, it is also extremely unlikely that arbitration could result in an award which would satisfy all parties. In that event, either party is entitled to bring an action in this court to vacate the arbitrator's award. 29 U.S.C. §1401(b)(1). Therefore, judicial economy would not be served by requiring exhaustion of the arbitrative remedy.

If the plaintiffs are not part of the controlling group or an employer of Tank Lines within the meaning of MPPAA, then obviously there would be no duty to arbitrate. This would be analogous to whether or not there is a contractural duty to arbitrate [See *Refined Sugars* v. *Loc. 807 Labor-Manage. Pens. Fund,* 580 F.Supp. 1457 (D.C.N.Y. 1984)]; and the Supreme Court has held that a judicial determination that a contract did create a duty to arbitrate must precede a compulsory submission to arbitration. *See,* e.g., *John Wiley & Sons., Inc.* v. *Livingston,* 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.E.2d 1409 (1960).

Therefore, because this case involves a statutory interpretation to determine the legal significance of facts which are basically undisputed, and because judicial economy would not be served by requiring arbitration, this court has jurisdiction to hear this case on the merits.

Once jurisdiction has been established, the All Writs Act, 28 U.S.C. §1651, gives the Court the power to enjoin the repetitive litigation of the same issue. *Redac Project 6426, Inc.* v. *Allstate Ins. Co.,* 412 F.2d 1043 (2nd Cir. 1969);/ *State of Michigan* v. *City of Allen Park,* 573 F.Supp. 1481 (D.C. Mich. 1983).

Inasmuch as an arbitration proceeding would relitigate the same issues involved in this case, and because the arbitrator's award could be contested at a later point in this court, 29 U.S.C. 1401(b)(1), it would not be in the public interest or conducive to judicial economy for such a proceeding to be commenced and carried forward.

Appendix A

Therefore, to prevent repetitive litigation of the same issue, the defendant will be enjoined from commencing and prosecuting an arbitration proceeding involving the same issues at bar.

ENTERED: (SIC)

(s) Thomas G. Hull
United States District Judge

Appendix A

(FILED JAN. 17, 1986)
IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

CENTRAL TRANSPORT, INC.,
ET AL

v. NO. CIV-2-85-470

CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND, *ET AL*

and

THE MASON AND DIXON TANK
LINES, INC.

v. NO. CIV-2-85-471

CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND, *ET AL*

and

MICHIANA TRUCKING, INC.,
ET AL

v.

NO. CIV-2-85-472

CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND, *ET AL*

ORDER GRANTING PRELIMINARY INJUNCTION

The Court, having reviewed the materials filed and having heard the arguments of counsel for the respective parties at Greeneville, Tennessee, on Friday, January 10, 1986 at 9:00 a.m., finds and orders as follows:

Appendix A

1. Plaintiffs would be financially and otherwise irreparably harmed if forced to pay withdrawal liability payments as presently calculated and defendants would not be harmed by issuance of an injunction.

2. The public interest and judicial economy would be served by enjoining arbitration during the pendency of these actions.

3. Defendants admitted that Michiana Trucking/Michiana Leasing are not liable for the withdrawal liability, the assessment of which is described in No. CIV-2-85-472.

Accordingly, in order to preserve the *status quo ante,* this Court:

A. Enjoins defendants and their agents, attorneys, representatives, employees and all other persons acting in concert with or at the direction of defendants, who receive actual notice of this Order, including the American Arbitration Association, preliminarily and during the pendency of the actions before this Court, from:

(1) Prosecuting, enforcing, collecting or accelerating the withdrawal liability claim which is the subject of these actions ("Claim") from plaintiffs or any of its joint and several obligors to which it would owe contribution.

(2) Declaring plaintiffs in default of any obligation or that they have waived any rights and procedures under MPPAA or Employees Retirement Income Security Act ("ERISA").

(3) Prosecuting the claim in arbitration against the plaintiffs, including, but not limited to, taking any action to select or nominate any arbitrator or otherwise proceeding with the arbitration commenced by letter dated January 7, 1986 to the American Arbitration Association.

B. Stays all time periods under MPPAA and ERISA for the commencement and prosecution of arbitration during the pendency of the actions before this Court.

Inasmuch as the matter of requiring security rests in the discretion of the Court, the Court has required no injunction bond at this time. However, if the defendants are of the opinion that they could be damaged if it is later determined that the injunction was improvidently issued, they can move for the requirement of an injunction bond in a reasonable amount within ten (10) days of the entry hereof, and introduce proof thereon.

A copy of this order shall be served by certified or registered mail upon the American Arbitration Association, 205 West Wacker, Suite 1100, Chicago, Illinois 60606; and that American Arbitration Association be and hereby is preliminarily enjoined, during the pendency of this action, from taking any further steps in or in furtherance of the arbitration commenced by Central States Southeast and Southwest Areas Pension Fund letter dated January 7, 1986, from Tom J. Frawley, Director, concerning the "Centra Group withdrawal liability", File No. 51-621-0002-86 MEPPA/F.

ENTER:

(s) Thomas G. Hull
United States District Judge

APPENDIX B

Memorandum and Order of the District Court, March 5, 1986

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

CENTRAL TRANSPORT, INC., *ET AL*

v.

No. CIV-2-85-470

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND, *ET AL*

MEMORANDUM AND ORDER

This action came before the Court for a hearing on plaintiffs' motion for summary judgment. The Court has carefully considered the record and the oral arguments made by counsel and finds that the plaintiffs' motion for summary judgment is well taken for the reasons hereinafter set out.

The plaintiffs, Central Transport, Inc., et al, contend that since their purchase of Mason and Dixon Lines stock was contingent upon ICC approval pursuant to the provisions of both their stock purchase agreement and 49 U.S.C. §11343, they did not own or control Mason and Dixon Lines or Tank Lines on the date of decertification of Tank Lines on December 31, 1983 as a matter of law, because ICC approval was not received until January 4, 1984. Therefore, plaintiffs have moved for summary judgment that they are not liable for withdrawal liability.

The defendant, Pension Fund, in its brief contends that three facts are undisputed: (1) Central Transport and GLS LeasCo are affiliates and are the wholly-owned subsidiaries of plaintiff, Cen-Tra, Inc.; (2) Mason and Dixon Tank Lines was and still is the wholly-owned subsidiary of Mason and Dixon Lines; and (3) by virtue of two stock purchase agreements dated November 29, 1983, Central Transport and GLS LeasCo acquired the exclusive right to purchase (together) one hundred percent (100%) of the

stock of Mason and Dixon Lines and Mason and Dixon Tank Lines. Defendant's brief further acknowledges that (a) Central Transport, Inc. received temporary authority from the ICC in regard to this sale on January 4, 1984 with permanent authority being received from ICC on March 7, 1984; and (b) prior to their acquisition by Central Transport, Inc., and GSL LeasCo, Crown Enterprises, Mason and Dixon Lines, and Mason and Dixon Tank Lines were owned and controlled by members of the King family of Kingsport, Tennessee.

Based upon these facts, and by applying the provisions of 26 U.S.C. §414(c), the defendant contends that the withdrawal liability assessment of $26,000,000.00 against the plaintiffs, Central Transport, Inc., *et al,* was proper. The defendants further contend that based on the theory of constructive ownership, as set out in 26 U.S.C. §414(c), Tank Lines was a member of the "controlled group" consisting of the plaintiffs on December 31, 1983 by virtue of the stock purchase agreement executed on November 29, 1983.

Although the defendant is correct that whether or not plaintiffs, Central Transport, Inc., *et al,* had constructive ownership of Mason and Dixon Lines stock will be dispositive of liability, based upon the stock purchase agreement and the undisputed facts of the case as given by the defendant, the application of 26 U.S.C. §414(c) as argued by the defendant would still entitle the plaintiffs to summary judgment. Although §414(c) is applicable to this case, a thorough examination of several statutes as well as applicable case law is necessary to reach a final decision in this matter.

The provisions of 29 U.S.C. §1301(b)(1) in regard to Pension Benefit Guaranty Corporations provide:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common

> control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under *section 414(c)* of Title 26. (emphasis added).

In turn, 26 U.S.C. §414(c) provides that corporations which are under common control shall be treated as employed by a single employer and states that:

> The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

In referring to 26 U.S.C. §414(b), a controlled group of corporations is defined as within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C). Therefore, the definitions and special rules as given under 26 U.S.C. §1563 are applicable to controlled group plan termination liability.

The applicability of §1563 has also been discussed in *Pension Ben. Guaranty Corp. v. Quimet Corp.*, 711 F.2d 1085, 1094 (1st Cir. 1983), *cert. denied*, 104 S.Ct. 393 (1983), in which the Court states:

> The principles of I.R.C. §1563(a)(2) are relevant to controlled group plan termination liability because ERISA defines an employer in terms of the regulations promulgated under I.R.C. § 414(c). 29 U.S.C. § 1301(b)(1) (Supp. V 1981); *see supra* note 6 (text of provision). I.R.C. § 414(c) and the related regulations define controlled groups of businesses using the principles of the I.R.C. § 1563 definitions. *See* generally Comment, *Extending ERISA Liability for Pension Plan Termination to Controlled Group Members: Pension Benefit Guaranty Corp. v. Quimet Corp.*, 61 B.U.L.Rev. 477, 491-02 (1981) (suggesting that the differ-

ence between section 1563 and section 414 is that the latter encompasses unincorporated as well as incorporated entities in the controlled group definitions and thus includes Trust).

In the case at bar, because the defendant contends that stock ownership is dispositive, 26 U.S.C. §1563(d)(1), which specifically deals with both direct and constructive ownership of *stock* is more on point than §11.414(c)-4, which generally defines ownership of *"interests."*

The applicable rules to determine stock ownership under §1563(a), as set out in 26 U.S.C. §1563(d)(1), are as follows:

> Parent-subsidiary controlled group.—For purposes of determining whether a corporation is a member of a parent-subsidiary controlled group of corporations (within the meaning of subsection (a)(1)), stock owned by a corporation means—
>
> (A) stock owned directly by such corporation, and
> (B) *stock owned with the application of subsection (e)(1)*. (emphasis added).

Stock ownership under 26 U.S.C. §1563(e)(1) is defined as follows:

> (e) Constructive ownership. — (1) Options. — If any person has an option to acquire stock, such stock shall be considered as owned by such person. For purposes of this paragraph, an option to acquire such an option, and each one of a series of such options, shall be considered as an option to acquire such stock.

In the case at bar, the defendant contends that withdrawal liability would be properly assessed against the plaintiffs, Central Transport, Inc., *et al.* by virtue of its constructive ownership of one hundred percent (100%) Mason and Dixon Lines stock,

because plaintiff's stock purchase agreement executed on November 29, 1983 was an option.

The Court in *Mid-America Industries, Inc. v. United States,* 341 F.Supp, 597 (D.C. Ark. 1972) reversed on other grounds 477 F.2d 1029, has defined the term "option" to purchase stock for the purposes of determining a "controlled group" unded 26 U.S.C. §1563(e)(1). In finding that a "Condition" was not an option under §1563(e)(1) because certain contingencies existed over which the holder of the "Condition" had no control, the Court held "that to constitute an option to purchase stock, the rights in question must enable the holder to purchase the stock 'presently at his election'." *Mid-America Industries, Inc., supra,* at 607.

In the case at bar, pursuant to both the stock purchase agreement and 49 U.S.C. §11343, ICC approval was a specific contingency in regard to the purchase of Mason and Dixon Lines, Inc.; and the plaintiff had no control of this contingency. Therefore, under the facts of this case, the stock purchase agreement was not an option; the plaintiffs had no constructive ownership of Tank Lines; and there can be no resulting withdrawal liability on the basis of the defendants' theory of constructive ownership.

In the event that the Court had adopted the view that the stock purchase agreement was in fact an option, the defendant's case would still fail if 26 U.S.C. §1563(f)(3)(B) and the I.R.C. regulations applicable to controlled groups and options are applied. The special rules of 26 U.S.C. §1563(f)(3)(B) provide:

> If stock is owned (within the meaning of subsection (d) by *two or more persons,* such stock shall be considered as owned by the person whose ownership of such stock results in the corporation being a component member of a controlled group. If by reason of the preceding sentence, a corporation would (but for this sentence) *become a component member of two controlled groups,*

> *it shall be treated as a component member of one controlled group.* The determination as to the group of which such corporation is a component member shall be made under regulations prescribed by the Secretary which are consistent with the purposes of this part. (emphasis added).

Under 26 CFR §1.1563-3(d), the special rule in regard to §1563(f)(3)(B) is given as follows:

> (2) *Component member of more than one group.* (i) If, by reason of subparagraph (1) of this paragraph, a corporation would (but for this subparagraph) become a component member of more than one controlled group on a December 31, such corporation shall be treated as a component member of only one such controlled group on such date. The determination as to which group such corporation is treated as a component member of shall be made in accordance with the rules contained in subdivisions (ii), (iii), and (iv) of this subparagraph.
>
> (ii) In any case in which a corporation is a component member of a controlled group of corporations on a December 31 as a result of treating each share of its stock as owned only by the person who owns such share *directly*, then each such share shall be treated as owned by the person who owns such share *directly*. (Emphasis added).

The following example is given to illustrate the application of this rule:

> *Example (1):* Jones owns all the stock of corporation X and has an option to purchase from Smith all the outstanding stock of corporation Y. Smith owns all of the outstanding stock of corporation Z. Since the Y stock is considered owned by two or more persons, under subparagraph (2)(ii) of this paragraph the Y

stock is treated as owned only by Smith since he has direct ownership of such stock. 26 CFR §1.1563-3(d)(3).

Therefore, assuming that Central Transport, Inc., *et al,* did, in fact, have constructive ownership by virtue of an option to purchase Mason and Dixon stock and Tank Lines, and that the King family had direct ownership of this stock and Tank Lines, pursuant to 26 U.S.C. §1563(f)(3)(B) and 26 CFR §1.1563-3(d)(2)(ii), Tank Lines can only be in one controlled group and would be considered to be a component member of a controlled group of corporations held by the King family because the King family was the *direct* owner of the stock in question on December 31, 1983. Consequently, withdrawal liability would properly be assessed against the King Family's controlled group rather than the plaintiffs, Central Transport, Inc., *et al.*

The defendant also contends that in the event that an equitable construction of §414(c) is applied pursuant to the guidelines of *IN RE Challange Stamping and Porcelain Co.,* 719 F.2d 146 (6th Cir. 1983), which seems to require a showing of actual control, that equities would also dictate the assessment of withdrawal liability against the plaintiffs. Inasmuch as this issue has been pretermitted, because an equitable construction of §414(c) has not been applied in this case, the necessity of the defendant showing actual control of Mason and Dixon Lines by the plaintiffs is not necessary to reach a decision in regard to withdrawal liability. However, based upon the briefs and argument of counsel, the entire record, including various depositions and affidavits, as well as the fact that temporary authority to take control of Mason and Dixon Lines was not granted to the plaintiff by the ICC until January 4, 1984, the Court finds that actual control was not established by the defendant on the part of the plaintiffs as of December 31, 1983. Therefore, the plaintiffs would still be entitled to summary judgment on the issue of withdrawal liability using the defendant's equitable theory.

Appendix B

It is, therefore, the ruling of the Court that the stock purchase agreement did not constitute an option; that Tank Lines was not a component member of the controlled group of corporations on December 31, 1983 held by Central Transport, Inc., *et al;* that the plaintiffs, Central Transport, Inc., *et al,* are consequently not liable for the withdrawal liability amount assessed; and that the plaintiffs' Motion for Summary Judgment is well taken and is hereby GRANTED.

ENTERED: (SIC)

(s) Thomas G. Hull
United States District Judge

APPENDIX C

Amended Judgment of the District Court, May 2, 1986

Appendix C

(FILED MAY 2, 1986)
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

CENTRAL TRANSPORT, *et al*

v.

CENTRAL STATES, ETC., *et al*

AMENDED JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV-2-85-470

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the stock purchase agreement did not constitute an option; that Tank Lines was not a component member of the controlled group of corporations on December 31, 1983 held by Central Transport, Inc., et al; that the plaintiffs, Central Transport, Inc., et al are consequently not liable for the withdrawal liability amount assessed; and that the plaintiffs' Motion for Summary Judgment is well taken and is granted and defendants are permanently enjoined, pursuant to the findings supporting this judgment, from any attempt to assess or collect withdrawal liability from the plaintiffs in this action in connection with the partial withdrawal that occurred at Mason & Dixon Tank Lines as a result of the decertification of Local 71 by a five-member bargaining unit at the North Carolina facility of Tank Lines on November 29, 1983 and the subsequent expiration of the collective bargaining agreement covering these employees on December 31, 1983.

May 2, 1986
Date

(s) Karl D. Saulpaw, Jr.
Clerk

(s) Elaine Milligan
(By) Deputy Clerk

APPENDIX D

Opinion of the Court of Appeals, April 17, 1987

Appendix D

(FILED APRIL 17, 1987)
NOT FOR PUBLICATION
NOS. 86-5222/86-5599
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL TRANSPORT, INC.; BANCROFT TRUCKING COMPANY; C.T. TRANSPORT, INC.; C.T. TRANSPORT, INC.; CENTRA, INC.; CENTRAL CARTAGE COMPANY, INC.; CENTRAL-ON-LINE DATA SYSTEMS, INC.; CENTRAL RECAPPING, INC.; THE CROWN ENTERPRISES, INC.; CRUISER TOURS, INC.; AMBRI, INC.; FLINT CARTAGE COMPANY; GLS LEASCO, INC.; GENERAL HIGHWAY EXPRESS COMPANY; MCKINLAY TRANSPORT, LTD.; MICHIGAN EXPRESS, INC.; MOHAWK MOTOR, INC.; PORT SIDE TRANSPORT, INC.; ROETHLISBERGER TRANSFER; SUPERIOR FORWARDING COMPANY, INC.; CONSOLIDATED FORWARDING; AND MOHAWK CARTAGE,

Plaintiffs-Appellees,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND LORAN W. ROBBINS; MARION M. WINSTEAD; ROBERT C. SANSONE; R. JERRY COOK; HOWARD MCDOUGALL; ROBERT J. BAKER; R. V. PULLIAM, SR.; AND ARTHUR H. BUNTE, JR., IN THEIR CAPACITY AS TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Decided and filed

BEFORE: JONES, KRUPANSKY AND BOGGS, Circuit Judges.

Appendix D

PER CURIAM. The defendants, Central States, Southeast and Southwest Areas Pension Fund and its Trustees (the defendants or the Fund), appealed from the district court's orders granting a preliminary injunction and summary judgment in favor of the plaintiffs, twenty-two companies, all of which were admittedly under common control prior to November 29, 1983, in this action challenging the Fund's assessment of over $26 million in pension withdrawal liability pursuant to the Multiemployer Pension Plan Amendments Act of 1980 (the MPPAA).

For purposes of the MPPAA, all employees of trades or businesses which are under common control, known as a controlled group, are treated as if they were employees of a single employer consisting of all of the commonly controlled businesses. The MPPAA authorizes multiemployer pension funds such as the defendant to assess "withdrawal liability" for unfunded vested benefits against all companies within a controlled group upon the withdrawal of any one of the companies within the controlled group from participation in the particular fund. Withdrawal liability is calculated upon the aggregate contribution history of all members of the controlled group. A partial withdrawal from the fund occurs when a single participating company of a controlled group permanently ceases to have an obligation to contribute into the fund under one or more but fewer than all collective bargaining agreements under which that single company had previously been obligated to contribute.

The record in the instant case disclosed that on November 29, 1983, two of the plaintiffs, Central Transport, Inc. (Transport) and its affiliate GLS LeasCo, Inc. (LeasCo), executed two stock purchase agreements with the shareholders of Mason & Dixon Lines, Inc. (Mason & Dixon), whereby Transport and LeasCo acquired the exclusive contractual right to purchase all of the outstanding shares of Mason & Dixon's stock, as well as that of its wholly owned subsidiary, Mason & Dixon Tank Lines, Inc. (Tank Lines). Consummation of the stock purchase was contin-

gent upon the ultimate approval of the transaction by the Interstate Commerce Commission (ICC). On December 31, 1983, Tank Lines, the subsidiary of Mason & Dixon, incurred partial withdrawal liability under the MPPAA by virtue of the expiration and nonrenewal of a collective bargaining agreement between it and five of its employees, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Local Union No. 71 (Local 71), under which agreement Tank Lines had previously contributed to the Fund. On January 4, 1984, Transport received ICC temporary authority to operate Mason & Dixon, subject to further ICC review, which operational control it assumed on January 9, 1984. Permanent ICC authority to operate Mason & Dixon was granted to Transport on March 7, 1984 together with approval of the stock acquisitions, which stock purchase agreements with Mason & Dixon were not ultimately consummated until February 1 and 2, 1985.

Between the dates of July 22 and August 31, 1985, the defendant Fund assessed plaintiffs Transport, LeasCo, and the other plaintiff members of the controlled group for partial withdrawal liability in an amount in excess of $26 million, calculated upon the aggregate unfunded vested benefits and contribution history of all plaintiffs. The withdrawal liability was assertedly triggered on December 31, 1983 with the expiration of the collective bargaining agreement between Tank Lines and five of its employees, represented by Local 71, and the failure to renew the collective bargaining agreement due to the employees' earlier decertification of Local 71 as bargaining agent. The plaintiffs challenged the assessment administratively and also initiated this action in federal district court, while the Fund sought to initiate arbitration of the matter as provided by the MPPAA. The district court in a published decision initially granted the plaintiffs' motion for a preliminary injunction enjoining the Fund from proceeding to arbitration of the dispute. *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 639 F.Supp. 788 (E.D. Tenn. 1986). The district court reasoned that

the traditional criteria governing the issuance of preliminary injunctive relief, more particularly the probability of success on the merits of the controversy and the likelihood of irreparable harm, weighed heavily in favor of the plaintiffs, and further concluded that the controlling issues joined by the pleadings were legal and not factual and were, accordingly, not properly the subject of arbitration under the MPPAA.

In a second published decision, the district court granted summary judgment in favor of the plaintiffs. *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund,* 640 F.Supp. 56 (E.D. Tenn. 1986). The dispositive substantive issue before the district court was the status of Tank Lines as a member of the plaintiff controlled group on the date of Tank Lines' partial withdrawal from the defendant Fund on December 31, 1983, and the consequent partial withdrawal liability, if any, that attached to all members of the plaintiffs' controlled group as a result of Tank Lines' partial withdrawal from the Fund.[1] The district court observed that, despite the execution of the stock purchase agreements between Transport, LeasCo, and Mason & Dixon on November 29, 1983 prior to the date of Tank Lines' withdrawal from the Fund on December 31, 1983, the ICC had not issued to Transport and LeasCo either the requisite operational control over Mason & Dixon and Tank Lines nor had it ultimately approved the stock acquisitions as required by law until January 4 and March 7, 1984, respectively. The district court concluded that, absent actual operational control and actual or constructive ownership of Mason & Dixon's and Tank Lines' stock by Transport and LeasCo, Tank Lines was not a member of the plaintiffs' controlled group on the withdrawal date, and the plaintiffs were therefore not subject to withdrawal liability.

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[1]It was conceded by the parties that Tank Lines and Mason & Dixon had incurred partial withdrawal liability as a result of the action between Tank Lines and Local 71 on December 31, 1983.

Appendix D

The Fund's separate notices of appeal from the two decisions of the district court have been consolidated into the instant appeal. Having examined the record on appellate review in its entirety and having considered the briefs and arguments of the parties, this court is of the view that the district judge correctly identified the considerations applicable to disposition of the instant dispute. Accordingly, for the reasons articulated in its published opinions, the judgment of the district court is AFFIRMED.

APPENDIX E

Order of the
Court of Appeals Denying
Preliminary Rehearing *en banc*

Appendix E

(FILED JUNE 5, 1987)
No. 86-5222/5599

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

CENTRAL TRANSPORT, INC., ET AL.,
Plaintiffs-Appellees,

v.

ORDER

CENTRAL STATES, SE AND SW AREAS
PENSION FUND, ET AL.,
Defendants-Appellants

BEFORE: JONES, KRUPANSKY and BOGGS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

APPENDIX F

Relevant Statutory Provisions

Appendix F

I. ERISA & PBGC Regulations

29 U.S.C. 1301 Definitions

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

29 U.S.C. § 1385. Partial withdrawals

(a) Determinative factors

Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year—

(1) there is a 70-percent contribution decline, or

(2) there is a partial cessation of the employer's contribution obligation.

(b) Criteria applicable

For purposes of subsection (a) of this section—

(1)(A) There is a 70-percent contribution decline for any plan year if during each plan year in the 3-year testing period the employer's contribution base units do not exceed 30 percent of the employer's contribution base units for the high base year.

(B) For purposes of subparagraph (A)—

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(i) The term "3-year testing period" means the period consisting of the plan year and the immediately preceding 2 plan years.

(ii) The number of contribution base units for the high base year is the average number of such units for the 2 plan years for which the employer's contribution base units were the highest within the 5 plan years immediately preceding the beginning of the 3-year testing period.

(2)(A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year—

(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location, or

(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.

(B) For purposes of subparagraph (A), a cessation of obligations under a collective bargaining agreement shall not be considered to have occurred solely because, with respect to the same plan, one agreement that requires contributions to the plan has been substituted for another agreement.

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29 U.S.C. § 1386. Adjustment for partial withdrawal; determination of amount; reduction for partial withdrawal liability; procedures applicable

(a) The amount of an employer's liability for a partial withdrawal, before the application of sections 1339(c)(1) and 1405 of this title, is equal to the product of—

(1) The amount determined under section 1391 of this title, and adjusted under section 1389 of this title if appropriate, determined as if the employer had withdrawn from the plan in a complete withdrawal—

(A) on the date of the partial withdrawal, or

(B) in the case of a partial withdrawal described in section 1385(a)(1) of this title (relating to 70-percent contribution decline), on the last day of the first plan year in a 3-year testing period, multipled by

(2) a fraction which is 1 minus a fraction—

(A) the numerator of which is the employer's contribution base units for the plan year following the plan year in which the partial withdrawal occurs, and

(B) the denominator of which is the average of the employer's contribution base units for—

(i) except as provided in clause (ii), the 5 plan years immediately preceding the plan year in which the partial withdrawal occurs, or

(ii) in the case of a partial withdrawal described in section 1385(a)(1) of this title (relating to 70-percent contribution decline), the 5 plan years immediately preceding the beginning of the 3-year testing period.

Appendix F

29 C.F.R. 2612—TRADES OR BUSINESSES UNDER COMMON CONTROL

Sec.

2612.1 Purpose and scope.

2612.2 Definitions.

2612.3 Trades or businesses under common control.

AUTHORITY: Secs. 4001(b), 4002(b)(3); Pub. L. 93-406, 88 Stat. 1003, 1004 (29 U.S.C. 1301(b), 1302(b)(3)).

SOURCE: 41 FR 12303, Mar. 25, 1976, unless otherwise noted.

§ 2612.1 Purpose and scope.

(a) Section 4001d(b) of the Employee Retirement Income Security Act of 1974 (88 Stat. 1003) provides in part, "[f]or purposes of this title, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." The purpose of this part is to prescribe regulations to determine the trades or businesses that shall be treated as a single employer for purposes of Title IV of the Act.

(b) This part applies with respect to all plans to which section 4021 of the Act (88 Stat. 1014) applies and which terminate:

(1) After June 30, 1974 and before September 2, 1974 and which have complied with the requirements of § 4082(b) of the Act (88 Stat. 1034); or,

(2) After September 1, 1974.

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§ 2612.2 Definitions.

For purposes of this part:

"Act" Means the Employee Retirement Income Security Act of 1974 (88 Stat. 829 *et seq.*).

"Trades or businesses (whether or not incorporated) which are under common control" has the same meaning as in section 414(c) of the Internal Revenue Code of 1954, added by section 1015 of the Act (88 Stat. 925), and the regulations issued thereunder.

§ 2612.3 Trades or businesses under common control.

For purposes of Title IV of the Act, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer, and all such trades and businesses shall be treated as a single employer.

II. Internal Revenue Code & Treasury Regulations

26 USC

§ 414 Definitions and special rules

26 U.S.C. 414 (b) Employees of controlled group of corporations.—For purposes of sections 401, 408(k), 410, 411, 415, and 416, all employees of all corporations which are members of a controlled group of corporations (within a meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the minimum funding standard of section 412, the tax imposed by section 4971, and the applicable limitations provided by section 404(a) shall be determined as if all such employers

were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

PROPOSED TREASURY REGULATION § 1.414(b)-1(a)

§ 1.414(b)-1 Controlled group of corporations.—(a) *Definition of controlled group of corporations.* For purposes of this section, the term "controlled group of corporations" has the same meaning as is assigned to the term in section 1563(a) and the regulations thereunder, except that (1) the term "controlled group of corporations" shall not include an "insurance group" described in section 1563(a)(4) and (2) section 1563 (e)(3)(C) (relating to stock owned by employees' trust) shall not apply. For purposes of this section, the term "members of a controlled group" means two or more corporations connected through stock ownership described in section 1563(a)(1), (2), or (3), whether or not such corporations are "component members of a controlled group" within the meaning of section 1563(b). Two or more corporations are members of a controlled group at any time such corporations meet the requirements of section 1563(a) (as modified by this paragraph). For purposes of this section, if a corporation is a member of more than one controlled group of corporations, such corporation shall be treated as a member of each controlled group.

26 U.S.C. 414 (c) Employees of partnerships, proprietorships, etc., which are under common control.—For purposes of sections 401, 408(k), 410, 411, 415, and 416, under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

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TREASURY REGULATION § 11.414(c)

TEMPORARY INCOME TAX REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Employees of Organizations Under Common Control

Temporary Regulations

The following temporary regulations under Code Sec. 414, relating to employees of organizations under common control, were adopted by T. D. 7388, filed with the Federal Register on October 31, 1975.

Preamble

The following temporary regulations relate to a part of the amendment made to the Internal Revenue Code of 1954 by section 1015 of the Employee Retirement Income Security Act of 1974 (88 Stat. 925). Section 1015 added section 414(c), relating to employees of partnerships, proprietorships, etc., which are under common control. The temporary regulations contained in this document pertain to section 414(c) and also apply for purposes of section 210(d) of the Employee Retirement Income Security Act of 1974 (88 Stat. 867).

Section 414(c) contains special rules which apply in the case of two or more trades or businesses which are under common control. If two or more trades or businesses are under common control, then for purposes of applying the provisions of sections 401 (qualified pension, profit-sharing, and stock bonus plans), 410 (minimum participation standards), 411 (minimum vesting standards), and 415 (limitations on benefits and contributions under qualified plans) all employees of all trades or businesses under common control are treated as employed by a single employer.

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Section 11.414(c)-2(a) provides that two or more trades or businesses are under common control if they constitute either a "parent-subsidiary group of trades or businesses under common control," a "brother-sister group of trades or businesses under common control," or a "combined group of trades or businesses under common control."

Paragraph (b)(1) of § 11.414(c)-2 defines a parent-subsidiary group to mean one or more chains of organizations (sole proprietorships, partnerships, trusts, estates, and corporations) conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if a controlling interest of each organization other than the common parent is owned by one or more of the other organizations and the common parent owns a controlling interest in at least one of the other organizations.

Paragraph (b)(2) of § 11.414(c)-2 defines the phrase "controlling interest" to mean: ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of a corporation; ownership of an actuarial interest of at least 80 percent of a trust or estate; ownership of at least 80 percent of the profits or capital interest of a partnership; and ownership of 100 percent of a sole proprietorship.

Paragraph (c)(1) of § 11.414(c)-2 defines a brother-sister group to mean two or more organizations conducting trades or businesses if the same five or fewer persons who are individuals, estates, or trusts own a controlling interest of each organization and effective control of each organization exists taking into account the ownership of each such person only to the extent such ownership is identical with respect to each organization. Paragraph (c)(2) of § 11.414 (c)-2 defines the phrase "effective control" to be an ownership interest of more than 50 percent.

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Paragraph (d) of § 11.414(c)-2 defines a combined group to mean any group of three or more organizations if each organization is a member of either a parent-subsidiary group or a brother-sister group and at least one such organization is the common parent of a parent-subsidiary group and is also a member of a brother-sister group.

Section 11.414(c)-3 provides that in the determination or controlling interest or effective control certain interests or stock are to be excluded and treated as not outstanding. Paragraph (b) or § 11.414(c)-3 provides the rules for a parent-subsidiary group and paragraph (c) provides the rules for a brother-sister group. The purpose of these rules is to prevent persons from divesting themselves of sufficient ownership to avoid the application of § 11.414(c)-2 without divesting themselves, as a practical matter, of the benefits of the ownership of an organization.

Section 11.414(c)-4 provides constructive ownership rules that apply in determining the ownership of an interest in an organization.

Adoption of regulations

To prescribe temporary regulations relating to a part of the amendment of the Internal Revenue Code of 1954 by section 1015 of the Employee Retirement Income Security Act of 1974 (88 Stat. 925) adding section 414(c), relating to employees of partnerships, proprietorships, etc, which are under common control, which also apply for purposes of section 210(d) of the Employee Retirement Income Security Act of 1974 (88 Stat. 867), and which shall remain in effect until superseded by permanent regulations, the following regulations are hereby adopted:

§ 11.414(c)-1 Commonly controlled trades or businesses.—For purposes of applying the provisions of section 401 (relating to qualified pension, profit-sharing, and stock bonus plans), 410 (relating to minimum participation standards), 411

(relating to minimum vesting standards), and 415 (relating to limitations on benefits and contributions under qualified plans), all employees of two or more trades or businesses under common control within the meaning of § 11.414(c)-2 for any period shall be treated as employed by a single employer. See sections 401, 410, 411, and 415 and the regulations thereunder for rules relating to employees of trades or businesses which are under common control. See §11.414(c)-5 for effective date.

§ 11.414(c)-2 Two or more trades or businesses under common control.—(a) *In general.* For purposes of this section, the term "two or more trades or businesses under common control" means any group of trades or businesses which is either a "parent-subsidiary group of trades or businesses under common control" as defined in paragraph (b) of this section, a "brother-sister group of trades or businesses under common control" as defined in paragraph (c) of this section, or a "combined group of trades or businesses under common control" as defined in paragraph (d) of this section. For purposes of this section and §§ 11.414(c)-3 and 11.414(c)-4, the term "organization" means a sole proprietorship, a partnership (as defined in section 7701 (a)(2)), a trust, an estate, or a corporation.

(b) *Parent-subsidiary group of trades or businesses under common control*—(1) *General.* The term "parent-subsidiary group of trades or businesses under common control" means one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if—

(i) A controlling interest in each of the organizations, except the common parent organization, is owned (directly and with the application of § 11.414(c)-4(b)(1), relating to options) by one or more of the other organizations; and

(ii) The common parent organization owns (directly and with the application of § 11.414(c)-4(b)(1), relating to options)

a controlling interest in at least one of the other organizations, excluding, in computing such controlling interest, any direct ownership interest by such other organizations.

(2) *Controlling interest defined*—(i) *Controlling interest.* For purposes of paragraphs (b) and (c) of this section, the phrase "controlling interest" means:

(A) In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation;

(B) In the case of an organization which is a trust or estate, ownership of an actuarial interest of at least 80 percent of such trust or estate;

(C) In the case of an organization which is a partnership, ownership of at least 80 percent of the profits interest or capital interest of such partnership; and

(D) In the case of an organization which is a sole proprietorship, ownership of such sole proprietorship.

(ii) *Actuarial interest.* For purposes of this section, the actuarial interest of each beneficiary of a trust or estate shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary. The factors and method prescribed in § 20.2031-7 or 20.2031-10, whichever is appropriate, of this chapter (Estate Tax Regulations) for use in ascertaining the value of an interest in property for estate tax purposes shall be used for purposes of this subdivision in determining a beneficiary's actuarial interest. [Amended by T. D. 7955.]

(c) *Brother-sister group of trades or businesses under common control*—(1) *General.* The term "brother-sister group of trades or businesses under common control" means two or more organizations conducting trades or businesses if (i) the same five

or fewer persons who are individuals, estates, or trusts own (directly and with the application of § 11.414(c)-4), singly or in combination, a controlling interest of each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization.

(2) *Effective control defined.* For purposes of this paragraph, persons are in "effective control" of an organization if—

(i) In the case of an organization which is a corporation, such persons own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote of such corporation or more than 50 percent of the total value of shares of all classes of stock of such corporation;

(ii) In the case of an organization which is a trust or estate, such persons own an aggregate actuarial interest of more than 50 percent of such trust or estate;

(iii) In the case of an organization which is a partnership, such persons own an aggregate of more than 50 percent of the profits interest or capital interest of such partnership; and

(iv) In the case of an organization which is a sole proprietorship, such persons own such sole proprietorship.

(d) *Combined group of trades or businesses under common control.* The term "combined group of trades or businesses under common control" means any group of three or more organizations, if (1) each such organization is a member of either a parent-subsidiary group of trades or businesses under common trade control or a brother-sister group of trades or businesses under common control and (2) at least one such organization is the common parent organization of a parent-subsidiary group of trades or businesses under common control and is also a member of a brother-sister group of trades or businesses under common control.

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(* * *)

§§11.414(c)-4(b)(1)—(b) *Constructive ownership*—(1) *Options.* If a person has an option to acquire any outstanding interest in an organization, such interest shall be considered as owned by such person. For this purpose, an option to acquire an option, and each one of a series of such options, shall be considered as an option to acquire such interest.

§§11.414(c)-4(c)(1) and (3): *Operating rules*—(1) *In general.* Except as provided in paragraph (c)(2) of this section, an interest constructively owned by a person by reason of the application of paragraph (b)(1), (2), (3), (4), (5), or (6) of this section shall, for the purposes of applying such paragraph, be treated as actually owned by such person.

(3) *Precedence of option attribution.* For purposes of this seciton, if an interest may be considered as owned under paragraph (b)(1) of this section (relating to option attribution) and under any other subparagraph of paragraph (b) of this section, such interest shall be considered as owned by such person under paragraph (b)(1) of this section.

Because of the need for immediate guidance with respect to determining whether the employees of a group of trades or businesses under common control shall be treated as employed by a single employer, it is found to be impractical to issue this Treasury decision with notice and public procedure thereon under subsection (b) of section 553 of title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

(This Treasury decision is issued under the authority contained in sections 414(c) (88 Stat. 925; 26 U.S.C. 414(c)) and 7805 (68A stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954.)

Donald C. Alexander,

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Commissioner of Internal Revenue

Approved: October 29, 1975

Charles M. Walker,
Assistant Secretary of the Treasury

(FR Doc. 75-29667 Filed 10-31-75; 11:45 am)

Found at 40 Fed. Reg. 51435 (1975)

26 U.S.C.—§§1563. Definitions and special rules

(a) Controlled group of corporations.—For purposes of this part, the term "controlled group of corporations" means any group of—

(1) Parent-subsidiary controlled group.—One or more chains of corporations connected through stock ownership with a common parent corporation if—

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1) by one or more of the other corporations; and

(B) the common parent corporation owns (within the meaning of subsection (d)(1) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

(2) Brother-sister controlled group.—Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2) stock possessing—

(A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and

(B) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

(3) Combined group.—Three or more corporations each of which is a member of a group of corporations described in paragraph (1) or (2), and one of which—

(A) is a common parent corporation included in a group of corporations described in paragraph (1), and also

(B) is included in a group of corporations described in paragraph (2).

(4) Certain insurance companies.—Two or more insurance companies subject to taxation under section 802 which are members of a controlled group of corporations described in paragraph (1), (2), or (3). Such insurance companies shall be treated as a controlled group of corporations separate from any other corporations which are members of the controlled group of corporations described in paragraph (1), (2), or (3).

(b) Component member.—

(1) General rule.—For purposes of this part, a corporation is a component member of a controlled group of corporations on a December 31 of any taxable year (and with respect to the taxable year which includes such December 31) if such corporation—

(A) is a member of such controlled group of corporations on the December 31 included in such year and is not treated as an excluded member under paragraph (2), or

(B) is not a member of such controlled group of corporations on the December 31 included in such year but is treated as an additional member under paragraph (3).

(2) Excluded members.—A corporation which is a member of a controlled group of corporations on December 31 of any taxable year shall be treated as an excluded member of such group for the taxable year including such December 31 if such corporation—

(A) is a member of such group for less than one-half the number of days in such taxable year which precede such December 31,

(B) is exempt from taxation under section 501(a) (except a corporation which is subject to tax on its unrelated business taxable income under section 511) for such taxable year,

(C) is a foreign corporation subject to tax under section 881 for such taxable year,

(D) is an insurance company subject to taxation under section 802 or section 821 (other than an insurance company which is a member of a controlled group described in subsection (a)(4), or

(E) is a franchised corporation, as defined in subsection (f)(4).

(3) Additional members.—A corporation which—

(A) was a member of a controlled group of corporations at any time during a calendar year,

(B) is not a member of such group on December 31 of such calendar year, and

(C) is not described, with respect to such group, in subparagraph (B), (C), (D), or (E) of paragraph (2),

shall be treated as an additional member of such group on December 31 for its taxable year including such December 31 if it was a member of such group for one-half (or more) of the number of days in such taxable year which precede such December 31.

(4) Overlapping groups.—If a corporation is a component member of more than one controlled group of corporations with respect to any taxable year, such corporation shall be treated as a component member of only one controlled group. The determination as to the group of which such corporation is a component member shall be made under regulations prescribed by the Secretary which are consistent with the purposes of this part.

(d) Rules for determining stock ownership.—

(1) Parent-subsidiary controlled group.—For purposes of determining whether a corporation is a member of a parent-subsidiary controlled group of corporations (within the meaning of subsection (a)(1)), stock owned by a corporation means—

(A) stock owned directly by such corporation, and

(B) stock owned with the application of subsection (e)(1).

(2) Brother-sister controlled group.—For purposes of determining whether a corporation is a member of a brother-sister controlled group of corporations (within the meaning of subsection (a)(2)), stock owned by a person who is an individual, estate, or trust means—

(A) stock owned directly by such person, and

(B) stock owned with the application of subsection (e).

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(e) Constructive ownership.—

(1) Options.—If any person has an option to acquire stock, such stock shall be considered as owned by such person. For purposes of this paragraph, an option to acquire such an option, and each one of a series of such options, shall be considered as an option to acquire such stock.

(2) Attribution from partnerships.—Stock owned, directly or indirectly, by or for a partnership shall be considered as owned by any partner having an interest of 5 percent or more in either the capital or profits of the partnership in proportion to his interest in capital or profits, whichever such proportion is the greater.

(3) Attribution from estates or trusts.—

(A) Stock owned, directly or indirectly, by or for an estate or trust shall be considered as owned by any beneficiary who has an actuarial interest of 5 percent or more in such stock, to the extent of such actuarial interest. For purposes of this subparagraph, the actuarial interest of each beneficiary shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary and the maximum use of such stock to satisfy his rights as a beneficiary.

(B) Stock owned, directly or indirectly, by or for any portion of a trust of which a person is considered the owner under subpart E of part I of subchapter J (relating to grantors and others treated as substantial owners) shall be considered as owned by such person.

(C) This paragraph shall not apply to stock owned by any employees' trust described in section 401(a) which is exempt from tax under section 4501(a)

(4) Attribution from corporations.—Stock owned, directly or indirectly, by or for a corporation shall be considered as owned by any person who owns (within the meaning of subsection (d))

5 percent or more in value of its stock in that proportion which the value of the stock which such person so owns bears to the value of all the stock in such corporation.

(5) Spouse.—An individual shall be considered as owning stock in a corporation owned, directly or indirectly, by or for his spouse (other than a spouse who is legally separated from the individual under a decree of divorce whether interlocutory or final, or a decree of separate maintenance), except in the case of a corporation with respect to which each of the following conditions is satisfied for its taxable year—

(A) The individual does not, at any time during such taxable year, own directly any stock in such corporation;

(B) The individual is not a director or employee and does not participate in the management of such corporation at any time during such taxable year;

(C) Not more than 50 percent of such corporation's gross income for such taxable year was derived from royalties, rents, dividends, interest, and annuities; and

(D) Such stock in such corporation is not, at any time during such taxable year, subject to conditions which substantially restrict or limit the spouse's right to dispose of such stock and which run in favor of the individual or his children who have not attained the age of 21 years.

(6) Children, grandchildren, parents, and grandparents.—

(A) Minor children.—An individual shall be considered as owning stock owned, directly or indirectly, by or for his children who have not attained the age of 21 years, and, if the individual has not attained the age of 21 years, the stock owned, directly or indirectly, by or for his parents.

(B) Adult children and grandchildren.—An individual who owns (within the meaning of subsection (d)(2)), but without regard to this subparagraph) more than 50 percent

of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock in a corporation shall be considered as owning the stock in such corporation owned, directly or indirectly, by or for his parents, grandparents, grandchildren, and children who have attained the age of 21 years.

(C) Adopted child.—For purposes of this section, a legally adopted child of an individual shall be treated as a child of such individual by blood.

(f) Other definitions and rules.—

(3) Special rules.—For purposes of this section—

(A) If stock may be considered as owned by a person under subsection (e)(1) and under any other paragraph of subsection (e), it shall be considered as owned by him under subsection (e)(1).

(B) If stock is owned (within the meaning of subsection (d)) by two or more persons, such stock shall be considered as owned by the person whose ownership of such stock results in the corporation being a component member of a controlled group. If by reason of the preceding sentence, a corporation would (but for this sentence) become a component member of two controlled groups, it shall be treated as a component member of one controlled group. The determination as to the group of which such corporation is a component member shall be made under regulations prescribed by the Secretary which are consistent with the purposes of this part.

(C) If stock is owned by a person within the meaning of subsection (d) and such ownership results in the corporation being a component member of a controlled group, such stock shall not be treated as excluded stock under subsection

(c)(2), if by reason of treating such stock as excluded stock the result is that such corporation is not a component member of a controlled group of corporations.

Treasury Regulation § 1.1563(d)

(d) Special rule of section 1563(f)(3)(B)—(1) In general. If the same stock of a corporation is owned (within the meaning of section 1563(d)) by two or more persons, then such stock shall be treated as owned by the person whose ownership of such stock results in the corporation being a component member of a controlled group on a December 31 which has at least one other component member on such date.

(2) Component member of more than one group. (i) If, by reason of subparagraph (1) of this paragraph, a corporation would (but for this subparagraph) become a component member of more than one controlled group on a December 31, such corporation shall be treated as a component member of only one such controlled group on such date. The determination as to which group such corporation is treated as a component member of shall be made in accordance with the rules contained in subdivisions (ii), (iii), and (iv) of this subparagraph.

(ii) In any case in which a corporation is a component member of a controlled group of corporations on a December 31 as a result of treating each share of its stock as owned only by the person who owns such share directly, then each such share shall be treated as owned by the person who owns such share directly.

(iii) If the application of subdivision (ii) of this subparagraph does not result in a corporation being treated as a component member of only one controlled group on a December 31, then the stock of such corporation described in subparagraph (1) of this paragraph shall be treated as owned by the one person described in such subparagraph who owns, directly and with the application of the rules contained in paragraph (b)(1), (2), (3), and (4) of this section, the stock possessing the greatest percent-

age of the total value of shares of all classes of stock of the corporation.

(iv) If the application of subdivision (ii) or (iii) of this subparagraph does not result in a corporation being treated as a component member of only one controlled group of corporations on a December 31, then the determination of that group of which such corporation is to be treated as a component member shall be made by the district director with audit jurisdiction of such corporation's return for the taxable year that includes such December 31 unless such corporation files an election as provided in this subdivision. The election shall be in the form of a statement, signed by a person authorized to act on behalf of such corporation, designating the group in which the corporation has elected to be included. The statement shall provide all the information with respect to stock ownership which is reasonably necessary to satisfy the district director that the corporation would, but for the election, be a component member of more than one controlled group. The statement shall be filed on or before the due date (including extensions of time) for the filing of the income tax return of such corporation for the taxable year. However, in the case of an election with respect to December 31, 1970, the statement shall be considered as timely filed if filed on or before December 15, 1971. Once filed, the election is irrevocable and effective until subdivision (ii) or (iii) of this subparagraph applies or until there is a substantial change in the stock ownership of such corporation.

(3) Examples. The provisions of this paragraph may be illustrated by the following examples, in which each corporation referred to uses the calendar year as its taxable year and the stated facts are assumed to exist on each day of 1970 (unless otherwise provided in the example):

Example (1). Jones owns all the stock of corporation X and has an option to purchase from Smith all the outstanding stock of corporation Y. Smith owns all the outstanding stock of corpora-

tion Z. Since the Y stock is considered as owned by two or more persons, under subparagraph (2)(ii) of this paragraph the Y stock is treated as owned only by Smith since he has direct ownership of such stock. Threrefore, on December 31, 1970, Y and Z are component members of the same brother-sister controlled group. If, however, Smith had owned his stock in corporation Z for less than one-half of the number of days of Z's 1970 taxable year, then under subparagraph (1) of this paragraph the Y stock would be treated as owned only by Jones since his ownership results in Y being a component member of a controlled group on December 31, 1970.

III. Transportation Act 49 U.S.C.

§ 11343. Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and

terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than

$2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that —

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The

Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

49 C.F.R. 1186—EXEMPTION OF CERTAIN TRANSACTIONS UNDER 49 U.S.C. 11343

Sec.

1186.1 Scope of exemption.

1186.2 Notice of exemption.

1186.3 Attachments.

1186.4 Temporary authority.

1186.5 Filing fees.

1186.6 Publication of summary notice.

1186.7 Effective date of exemption.

1186.8 Complaints.

Appendix F

§ 1186.1 Scope of exemption.

Any transaction under 49 U.S.C. 11343(a)(1)-(5) among motor carriers of property or between them and noncarriers is exempt from the requirements of 49 U.S.C. 11343, 11344, and 11345a, subject to the right of employees and others to file complaints as set forth in § 1186.8. In addition, the sale or lease of operating rights between a motor carrier of property and a noncarrier, the sale or lease of operating rights between two motor carriers of property, the merger of two or more motor carriers of property, and the merger of a carrier of property and a noncarrier, which are not subject to 49 U.S.C. 11343, are subject to these regulations. See **Note** preceding 49 CFR 1181.1.

§ 1186.2 Notice of exemption.

To qualify for an exemption under § 1186.1, the participants in the transaction must file an original and four copies of a joint Notice of Exemption with the Commission. The Notice of Exemption shall contain the following information:

(a) Names and addresses of the carriers or other parties involved;

(b) A brief, but specific description of the nature of the transaction;

(c) Certification of the accuracy of the contents of the notice by, and signatures of, the persons who control the carriers or other parties involved in the transaction; and

(d) A jurisdictional statement indicating whether the transaction is subject to 49 U.S.C. 11343-11344 or 49 U.S.C. 10926.

§ 1186.3 Attachments.

Attachments (an original and four copies) to the Notice of Exemption filed with the Commission should include:

(a) A short summary of the transaction to be published as a notice to the public; and

(b) If appropriate, draft certificates and permits reflecting the operating rights authorized to be acquired, retained, or issued.

§ 1186.4 Temporary authority.

Parties may simultaneously request temporary authority during the pendency of the exemption proceeding by submitting Form OP-F-46 in accordance with the regulations prescribed at 49 CFR 1183.4. The fee will be the same as that specified at 49 CFR 1002.2(f)(24.)

§ 1186.5 Filing fees.

For transactions subject to 49 U.S.C. 11343(a)(1)-(5), the filing fee required to file a Notice of Exemption is set forth in 49 CFR 1002.2(f)(27). For transactions subject to 49 U.S.C. 10926, the required filing fee is set forth in 49 CFR 1002.2(f)(25).

§ 1186.6 Publication of summary notice.

The Commission will publish the summary of the Notice of Exemption describing the nature and scope of the transaction in the ICC Register.

§ 1186.7 Effective date of exemption.

When a Notice of Exemption is filed, the exemption will be effective 60 days after a summary of the Notice of Exemption is published in the *ICC Register* except:

(a) Where consummation is contingent upon Commission approval of directly related applications involving the conversion of certificates of registration to certificates of public convenience and necessity; or

(b)(i) In the case of employee complaints, a decision will be served and effective 30 days after receipt of the complaint unless the complaint is filed less than 30 days after publication of the summary of the Notice of Exemption, in which case the decision will be effective 60 days after publication of the summary of the Notice of Exemption; or

(b)(ii) In the case of a complaint on anticompetitive grounds, a decision will be served and effective 30 days after the due date for complaints.

§ 1186.8 Complaints.

(a) For transactions subject to 49 U.S.C. 11343(a)(1)-(5), employees who have been or may be adversely affected by an exempt transaction or transaction proposed for exemption may file a complaint with the Commission any time after the Notice of Exemption is filed. A copy of the complaint must be served on the parties to the transaction. The parties may file an answer with the Commission and upon complainant within 10 days after receipt of the complaint. Employee complaints must contain the following information:

(1) The docket number of the corresponding Notice of Exemption (if available at the time) and the names of the participants in the transaction;

(2) Names of the employees alleged to be affected by the transaction and the nature and scope of harm;

(3) A request for specific relief (requests for relief in the alternative are acceptable);

(4) An explanation as to why the particular relief sought is the appropriate remedy for the particular harm suffered; and

(5) (Optional) A request for suspension or revocation of the exemption, accompanied by information showing why suspension or revocation of exemption is necessary.

(b) For all transactions subject to these regulations, any party may file a complaint with the Commission within 30 days after the Notice of Exemption is published alleging that the transaction is potentially anticompetitive. A copy of the complaint must be served on the parties to the transaction. The parties may respond by filing an answer with the Commission and upon complainant within 10 days after the due date of the complaint. The complaint must contain the following information:

(1) The docket number of the corresponding Notice of Exemption (if available at the time) and the names of the participants in the transaction;

(2) A specific description of the manner in which competition will allegedly be adversely affected;

(3) A request for specific relief (requests for relief in the alternative are acceptable); and

(4) An explanation as to why the particular relief sought is deemed to be appropriate.

(c) Petitioners shall promptly furnish any interested party with a copy of the Notice of Exemption and any attachments, free of charge.

Authority: 49 U.S.C. 10321 and 11343(e) and 5 U.S.C. 553.

SOURCE: Part 1186 added by Order, ICC, Nov. 21, 1984, effective Jan. 11, 1985, 49 *F. R. 48314; amended by Order, ICC, Feb.* 6, 1985, *effective Feb.* 15, 1984, *50 F. R.* 6348.

APPENDIX G

PBGC Advisory Opinion 86-8
(March 24, 1986)

Appendix G

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

I apologize for our delay in responding to your inquiry regarding the proper method for determining withdrawal liability when the liable employer is a group of trades or businesses under common control ("controlled group") within the meaning of section 4001 of ERISA, 29 U.S.C. §1301. Your letter suggests two alternatives: (1) aggregating the contribution data for all members of the controlled group, calculating the potential withdrawal liability of the group based on this data, and "allocating" a portion of this liability to each member of the controlled group or (2) calculating potential withdrawal liability based on each member's contributions as if each member was a withdrawing employer and then aggregating each member's liability to arrive at the withdrawal liability for the entire controlled group. You indicate that your client, a multiemployer plan, has used the first method in the past but has inquired about the possible use of the second method.

ERISA section 4001(b)(1) requires that a controlled group be treated as a single employer under Title IV of ERISA. This definition of "employer" applies for all purposes under Title IV, including the provisions added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). PBGC Opinion Letter 82-13.

The second of the two methods you describe is inconsistent with the statutory defintion of "employer." The second method incorrectly treats each member of the controlled group as a separate employer by determining liability for that member based on its contribution data. In many cases failure to calculate liability of the group as a whole based on its aggregate contribution obligation will lead to erroneous determinations of the amount of withdrawal liability (or of whether a withdrawal has occurred). For example, as you recognize, the de minimis rule under section 4209 reduces the withdrawal liability of an "employer"; applying the de minimis rule separately to liabilities calculated for each

controlled group member might lead to the erroneous result of multiple reductions for a single employer. Similarly, the fraction used for calculating partial withdrawal liability under section 4206 is based on "the employer's" contribution base units, even if the partial withdrawal results from the withdrawal of a facility operated by only one member of the controlled group. Therefore, subject to the qualification noted below, only the first of the methods you describe is correct.

Our approval of the first method does not extend to your client's practice of "allocating" the withdrawal liability among the members of the controlled group. To the extent that such allocation limits the plan's recourse against each member of the controlled group, it is inconsistent with the fact that the members of a controlled group are jointly and severally liable to the plan for the full withdrawal liability of the group, just as members of a controlled group are jointly and severally liable to PBGC for liability under ERISA section 4062, 29 U.S.C. §1362, arising from termination of one member's single-employer plan. Although members of a controlled group may be concerned about allocating withdrawal liability among themselves and may assert rights of contribution or indemnification against each other, such issues do not affect a plan's right to assert joint and several liability against all members of the controlled group.

I hope this is helpful. If you have questions, please contact the attorney handling this matter, Ronald Goldstein of our Corporation Policy and Regulations Department, at the above address or (202) 956-5050.

Very truly yours,

Edward R. Mackiewicz
General Counsel

APPENDIX H

Relevant Exhibits

Appendix H

AFFIDAVIT OF THOMAS J. FRAWLEY

The affiant, if called as a witness, could competently testify from his personal knowledge to all of the facts stated herein.

The undersigned, Thomas J. Frawley, Director of Plan Compliance Division of Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund"), under oath, states that he personally examined the records of said Pension Fund relating to the account of Centra, Inc. and that said records indicate the following:

1. That Centra, Inc. is a member of a controlled group of trades or businesses which includes members that are or were obligated to make pension contributions to the Pension Fund pursuant to the terms of various collective bargaining agreements to which such members were parties.

   That the contributions and contribution base units ("CBUs") for such members during the years relevant to the partial withdrawal liability assessment calculation are as follows:

Year	Amounts	# CBUs	Avg. Weekly Rate
1978	$ 7,601,428.00	252,074.0	$30.16
1979	9,106,055.00	238,761.0	38.14
1980	9,085,354.00	205,046.0	44.31
1981	9,183,705.00	186,410.0	49.27
1982	(+) 8,563,543.50	(+) 160,494.0	53.36
TOTAL	$43,540,085.50	1,042,785.0	
5 Year Avg.	$ 8,708,017.10	208,557.0	$41.75
1984	6,091,637.50	111,492.0	$54.64
1985	5,138,337.00	84,731.0	$60.64

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That the reduction in annual contribution income to the Pension Fund with respect to such controlled group has been estimated as follows:

Year	5 Year Avg. # CBUs		CBUs		Avg. Weekly Rate		Est. Reduction In Income
1984	208,557.0	(−)	111,492	(×)	$54.64	(=)	$5,303,631.60
1985	208,557.0	(−)	84,731	(×)	$60.64	(=)	$7,508,808.64

2. That Mason and Dixon Lines, Inc. and Mason and Dixon Tank Lines, Inc. are members of the controlled group of trades or businesses which includes Centra, Inc.

That the contributions and contribution base units for Mason and Dixon Lines, Inc. and Mason and Dixon Tank Lines, Inc. during the years relevant to the partial withdrawal liability assessment calculation are as follows:

Year		Amounts	# CBUs	Avg. Weekly Rate
1978		$ 3,518,846.00	115,830.4	$30.38
1979		4,291,939.00	112,243.2	38.24
1980		4,373,191.00	98,345.6	44.47
1981		4,204,303.00	85,384.6	49.24
1982	(+)	3,651,865.00	(+) 68,401.2	53.39
TOTAL		$20,040,144.00	480,205.0	
5 Year Avg.		$ 4,008,028.80	96,041.0	$41.73
1984		$ 1,656,122.00	30,172.6	$54.89
1985		$ 506,486.00	8,865.4	$57.13

Appendix H

That the reduction in annual contribution income to the Pension Fund with respect to Mason and Dixon Lines, Inc. and Mason and Dixon Tank Lines, Inc. has been estimated as follows:

Year	5 Year Avg. # CBUs		CBUs		Avg. Weekly Rate		Est. Reduction In Income
1984	96,041.0	(−)	30,172.6	(×)	$54.89	(=)	$3,615,516.48
1985	96,041.0	(−)	8,865.4	(×)	$57.13	(=)	$4,980,342.03

(s) Thomas J. Frawley

Subscribed and sworn before me
this 28th day of January, 1986.
(s) Stacy M. VandeVusse
Notary Public

My Commission Expires 2-8-86

Appendix H

EXHIBIT D
STOCK PURCHASE AGREEMENT

THIS AGREEMENT, made and entered into this 29th day of November, 1983, by and among (i) those persons listed on Exhibit "A" (collectively called "Seller"), legal and beneficial owners of all of the issued and outstanding shares of capital stock, both common and preferred, ("Shares") of THE MASON AND DIXON LINES, INCORPORATED, a Tennessee corporation with offices located in Kingsport, Tennessee ("MD") except those shares owned by the Crown Enterprises, Inc. ("Crown"), a Tennessee corporation, representing Twenty-two (22%) Percent of the common stock of MD and Three Hundred Two (302) shares of non-voting preferred stock and by (ii) MD and its subsidiary corporation THE MASON AND DIXON TANK LINES, INC., a Tennessee corporation ("Subsidiary"), and by (iii) CENTRAL TRANSPORT, INC., a Michigan corporation with offices located in Sterling Heights, Michigan ("Buyer").

W I T N E S S E T H :

The following is a recital of facts underlying this Agreement:

Seller, as the owner of the Shares has agreed to sell, and Buyer has agreed to purchase, all of the Shares as well as any and all dividends to become due thereon and any and all other claims of every nature Seller now has or hereafter may have against MD and Subsidiary ("Purchased Shares") on the terms and conditions set forth herein.

Subsidiary's capital stock is wholly owned by MD.

Seller and Buyer have agreed that this Stock Purchase Agreement is contingent upon Buyer's affiliated company GLS LeasCo, Inc. executing a certain stock purchase agreement with the stockholders of Crown, and Crown of even date herewith, for the purchase of all of the capital stock issued by Crown.

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* Note

NOW, THEREFORE, subject to the foregoing and in consideration of the mutual representations, covenants, guarantees, warranties and promises hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

1.0 *PURCHASE AND SALE.* Seller does hereby sell, and Buyer does hereby purchase the Purchased Shares, all of which are owned by Seller, for a sum equal to the consolidated book value net worth of MD and Subsidiary as determined in Paragraph 2.0 hereof expressed in an amount per share of stock of MD, less any indebtedness Seller may owe to MD or Subsidiary ("Purchase Price"). The Purchase Price shall be paid as follows subject to adjustment under Paragraph 13.0: (i) One Hundred Thousand ($100,000.00) Dollars on the date of execution of this Stock Purchase Agreement ("Deposit"), (ii) Fifty (50%) Percent of the Purchase Price in cash on the Control Date (as hereinafter defined), less the Deposit; and (iii) Execution by Buyer of a Promissory Note on the Closing Date for the balance of the Purchase Price. Such Promissory Note shall be in substantially the form attached hereto as Exhibit "B" bearing interest at the rate of one and one-half (1-1/2%) percent below the prime lending rate, as adjusted from time to time, established by Citibank of New York, New York, and shall be secured by an irrevocable letter of credit mutually satisfactory to the parties and subject only to the terms of this Stock Purchase Agreement and the Promissory Note executed pursuant hereto issued by a national banking institution or a bank chartered under the laws of the State of Tennessee, having, at all times, a combined capital surplus and stockholders' equity of not less than $100,000,000.00.

2.0 *PURCHASE PRICE.*

2.1 *Determination of Book Value.* The consolidated book value net worth ("Book Value") of MD and Subsidiary shall be determined as of the close of business on the Control Date (as defined in Paragraphs 6.1 and 23.0 hereof) based upon an

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* Note

examination by a firm of Certified Public Accountants of the books and records of MD and Subsidiary as if their fiscal years ended on that day, giving full effect to all the representations, covenants, guarantees, warranties, terms, provisions and conditions contained in this Stock Purchase Agreement and reducing the Book Value by the amount of all potential liabilities of MD and Subsidiary, including without limitations, liabilities for the items set forth in the Exhibits attached hereto ("Examination"). Coopers & Lybrand, Certified Public Accountants ("Accountants"), shall conduct the Examination, in accordance with generally accepted auditing standards, of the consolidating balance sheets of MD and Subsidiary as of the close of business on the Control Date and the related consolidating statements of income, changes in financial position and shareholders' equity for the period from their preceding fiscal year-end to such date. The Examination by the accountants shall include all auditing procedures necessary to enable them to submit, without qualification, except for matters specifically covered by this Stock Purchase Agreement or except as otherwise agreed to in writing by Buyer, their opinion that such balance sheets and related statements present fairly the financial condition and results of operations of MD and Subsidiary in accordance with this Stock Purchase Agreement and in accordance with generally accepted accounting principles consistently applied. The Stock Purchase Agreement shall prevail if there is a conflict between the Stock Purchase Agreement and generally accepted accounting principles. Seller shall instruct the Accountants to provide full access to Buyer and its representatives to all working papers, files, notes, comments, correspondence, data and all other information (including without limitation, their work product, files, notes, comments and correspondence) prepared or obtained by the Accountants in connection with such Examination and prior audits of MD and Subsidiary ("Materials") at any time during and following the Examination. Accountants shall provide Buyer with copies of any Materials requested by Buyer. Accountants will be deemed to

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* Note

have undertaken a fiduciary duty to Seller, Buyer, MD and Subsidiary to perform the Examination in accordance with all terms, conditions and criteria for the Examination set forth in this Stock Purchase Agreement by the commencement of the Examination. Accountants shall retain all materials used in the preparation of the Examination until Buyer and Seller shall jointly advise Accountants in writing that they may destroy any Materials. If the Examination is not completed within six (6) months from the date of execution of this Stock Purchase Agreement, Buyer, Seller and MD shall cooperate fully in causing Accountants to deliver all Materials to Deloitte, Haskins & Sells (Detroit Office) which shall then conduct the Examination. The fees and expenses of the Accountants and of Deloitte, Haskins & Sells shall be divided equally between Buyer and Seller.

2.2 *Preparation of Examination.* In the preparation of the Examination, the Accountants shall reflect, but shall not be limited to, the following:

2.2.1 *Items Capitalized.* No item shall be capitalized which has been previously expensed and no item shall be capitalized which, prior to January 1, 1983, it has been the practice of MD and Subsidiary to expense, provided, however, in determining Book Value and/or net worth of MD and/or Subsidiary, the accountants shall account for leased fixed assets, for purposes of this Stock Purchase Agreement, on an historical cost basis, less depreciation, rather than capitalizing the lease(f).

2.2.2 *Litigation.* An accrual shall be established for all costs, expenses and potential liabilities of any pending or threatened litigation.

2.2.3 *Undelivered Shipments.* Seller shall cause MD and Subsidiary to continue their normal business practices concerning picking up and delivering freight through the close of business on the Control Date.

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* Note

Appendix H

2.2.4 *Cancellation of Benefits.* An accrual shall be established for all liabilites, costs or expenses for the cancellation of all insurance policies whatsoever (health, life, disability, or otherwise) and any other benefits as if the cancellation had occurred at the time Buyer assumed control on the Control Date.

2.2.5 *Accruals.* There shall be accrued as an expense on the books of MD and Subsidiary all liabilities applicable to matters covered by or arising out of this Stock Purchase Agreement, whether then due or payable, and also any and all other costs, expenses, obligations and liabilities whatsoever incurred or entered into prior to the close of business on the Control Date, and the aggregate amount of any such accruals shall be reflected as a liability on the consolidated balance sheets of MD and Subsidiary.

2.3 *Dispute Over Accounting Matters.* If a dispute shall arise with respect to any accounting or auditing treatment relative to the Examination notice in writing thereof shall be given by the disputing party to Accountants within thirty (30) days from the receipt of the Examination referred to in Paragraph 2.1. Within thirty (30) days after receipt of such notice, the dispute shall be submitted to arbitration by the disputing party for review and determination. The arbitrator shall be Deloitte, Haskins & Sells, Certified Public Accountants, Detroit, Michigan, whose review and determination shall be limited to determining the proper method of accounting of the transaction submitted. The fees and expenses of the arbitrator shall be divided equally between Buyer and Seller. Any questions of contract interpretation shall be determined by the Circuit Court for the County of Macomb, State of Michigan, which shall be deemed to be the exclusive court of competent jurisdiction and proper venue to hear such disputes. The decision of the arbitrator may be entered as a judgment before such court.

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Appendix H

3.0 *REPRESENTATIONS, COVENANTS, GUARANTEES AND WARRANTIES OF SELLER, MD AND SUBSIDIARY.* Seller, MD and Subsidiary hereby jointly and severally make the representations, covenants, guarantees and warranties set forth below, which representations, covenants, guarantees and warranties shall survive the closing of this Stock Purchase Agreement. Seller, MD and Subsidiary acknowledge and affirm that Buyer is relying on such representations, covenants, guarantees and warranties being true as a material consideration for the execution of this Stock Purchase Agreement.

3.1 *Incorporation.* MD and Subsidiary are now and on the Control Date will be, duly incorporated, validly existing and in good standing under the laws of the State of Tennessee, and are now and on the Control Date will be, authorized to transact business in all jurisdictions where their activities require qualification.

3.2 *Organization.* MD and Subsidiary were incorporated by Articles of Incorporation, true copies of which, as amended to date, are attached hereto as Exhibit "C", and no other amendments or restatements of such Articles of Incorporation have been granted to or applied for by any of them.

3.3 *Free and Clear, Etc.* On the Control Date and on the Closing Date, the Shares will be validly issued and outstanding, fully paid for and non-assessable, unencumbered and owned by Seller in the amounts shown in Exhibit "A" attached hereto with the lawful right, power and title of Seller to sell, transfer, assign and convey the Shares to Buyer free and clear of any liens, claims or encumbrances of any kind or nature whatsoever, including without limitation, liens for unpaid taxes, brokerage or finders' fees, or beneficial or legal interests of third parties of any manner whatsoever.

3.4 *Right to Purchase or Acquire.* No one now has, nor on the Control Date nor on the Closing Date will have, any equity or

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rights by way of option, subscription, contract or otherwise to purchase or otherwise acquire any portion of the Purchased Shares or other securities of MD or Subsidiary other than Buyer hereunder, or other than as may be granted by Buyer.

3.5 *By-Laws, Minute Books and Record Books* The by-laws, minute books and record books of MD and Subsidiary are now, and on the Control Date will be, true, accurate and complete and will be available for inspection at any reasonable time by Buyer's duly authorized representative. In addition, copies of any minutes of any meetings held or of documents otherwise constituting corporate action by MD or Subsidiary will be properly recorded and will be promptly furnished to Buyer upon written request.

3.6 *Conformity to Law.* All action taken by the officers, representatives, agents, employees, shareholders and directors of MD or Subsidiary have been conducted substantially in conformity with all applicable laws, rules and regulations and will be so taken up to the Control Date.

3.7 *Lawful Execution.* The execution of this Stock Purchase Agreement and the performance of the terms, provisions and conditions herein contained, including without limitation, the closing of the sale of the Purchased Shares, does not and will not constitute or result in any violation of any of the terms, conditions or provisons of, or constitute a default under or result in the creation of, any lien, charge or encumbrance on any property or assets of MD or Subsidiary or on the Purchased Shares for any reason whatsoever, including without limitation, pursuant to any law, Articles of Incorporation, by-laws, agreements or instruments to which Seller, MD and Subsidiary or any of them is, at or prior to the Control Date, a party or by which any of them may be bound or affected.

3.8 *Financial Condition.* The financial statements of MD and Subsidiary consisting of balance sheets, statements of income, statements of retained earnings, and statements of changes

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in financial position for the period ending December 31, 1982, and attached hereto as Exhibits "D" and "D-1", respectively (collectively "Financial Statements"), truly and accurately reflect the financial condition of MD and Subsidiary as of that date and the results of operations for the period indicated and were prepared in conformity with generally accepted accounting principles consistently applied.

3.9 *Tax Liability.* Except as set forth in Exhibit "E" attached hereto, MD and Subsidiary have, and on the Control Date will have, properly and accurately filed any and all tax returns and governmental reports which are required to be filed in all required jurisdictions. MD and Subsidiary have properly paid or accrued, and will have properly paid or accrued on the Control Date, all amounts which have become or will become a liability or lien, including but not limited to, all amounts as shown on said returns and/or reports and also on all assessments and all notices of deficiency or assessment. MD and Subsidiary have not, nor prior to the Control Date will have, without the written consent of Buyer, executed or agreed to any waivers of rights or statutes of limitations on any claims against them or on the right of any taxing or governmental authority to assess additional taxes or claims or to contest the income or loss reported with respect to any tax period except as set forth in Exhibit "F" attached hereto.

3.10 *Changes in Financial Condition.* There have not been, nor on the Control Date will there be, any material or adverse changes in the financial condition of MD or Subsidiary from that reflected in the Financial Statements, other than normal and necessary changes occurring in the ordinary course of business.

3.11 *Lawful Operation.* The business of MD and Subsidiary has been and until the Control Date will be conducted and operated, and the properties and assets of MD have been and until the Control Date will be held, substantially in accordance with all applicable licenses, laws, ordinances, rules and regulations.

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Appendix H

3.12 *Enter Into Contracts.* From and after the date hereof and until the Control Date, MD and Subsidiary will not enter into any agreements or contracts, other than for normal and necessary current operating supplies and services, without the prior written consent of Buyer.

3.13 *Proceedings.* Since December 31, 1982, there have not been, nor on the Control Date will there be, any fines, assessments, penalties, litigation, arbitration or other proceedings pending or threatened against or affecting MD or Subsidiary or any of its properties or assets before any court or before any federal, state, municipal or other governmental department, commission, board, bureau, agency, instrumentality or regulatory body which, if decided against MD or Subsidiary would have a material or adverse effect on MD or Subsidiary, except for the matters set forth in Exhibit "G" attached hereto or for which insurance has been paid for by Seller with full coverage extending to the occurrence involved. Seller shall be liable for any fines, assessments, penalties, litigation or arbitration arising from facts, occurrences or omissions that took place prior to the Control Date except that Seller shall receive credit for such liability equal to the amount of insurance coverage or reserves maintained on the date of execution of this Stock Purchase Agreement by Seller for such particular claim. Buyer shall give Seller notice of any litigation which may reasonably result in liability of Seller in excess of such insurance coverage or reserves. Seller may elect to co-defend any litigation matter so noticed. Seller shall be released from liability of any litigation matter for which Buyer fails to give notice. Buyer shall have absolute control over settlement of any such matters up to the amount of insurance coverage or reserves. Buyer and Seller must mutually agree on any settlement in excess of such amount provided Buyer and Seller may settle their own liability without approval of the other if the settlement agreement provides that it may not be used to influence the litigation in any manner.

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Appendix H

3.14 *Title to Properties and Assets.* MD and Subsidiary own and have, and on the Control Date will own and have, good, valid and marketable title to all properties and assets owned by them, including but not limited to, the properties and assets reflected in the Financial Statements attached hereto as Exhibit "D", and those acquired by MD or Subsidiary since the date of such Financial Statements (except for properties and assets sold or consumed in the normal, ordinary and necessary course of business since the date of such Financial Statements), subject to no liens, encumbrances, charges or restrictions of any kind whatsoever except as set forth in Exhibit "H" attached hereto.

3.15 *Use of Properties and Assets.* Except as set forth in Exhibit "I" attached hereto, Seller, MD and Subsidiary have no notice or knowledge that any of their properties or assets, (whether owned, leased or controlled by them), or the occupancy or operation thereof, violates any applicable ordinances, rules, regulations, codes, zoning or other laws and/or requirements, including without limitation, those of the Interstate Commerce Commission, and all other applicable regulatory authorities ("Regulatory Authorities").

3.16 *Insurance.* Seller shall cause MD and Subsidiary to maintain, from and after the date hereof and through and including the Control Date, such insurance policies with respect to all its properties, assets and business, including without limitation, fire, casualty, property and all appropriate liability, as are normal, ordinary and necessary in the conduct of their business and such insurance is carried by Seller on the date of execution hereof, except as set forth in Exhibit "J" attached hereto.

3.17 *Benefits.* There are not now, nor on the Control Date will there be, any commitments made for health insurance, life insurance, profit sharing, stock options, share purchase, retirement, or any other benefits whatsoever to which any shareholder, director, officer, employee or other person may be entitled for which MD and Subsidiary may be or become liable which cannot

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be terminated upon 30 days notice or less without premium, penalty or liability, except to the extent of liability set forth in Exhibit "K" attached hereto.

3.18 *Default on Agreements.* On the date hereof, MD and/or Subsidiary are not in default under any lease, contract or other agreement to which it is a party or by which it is bound and there has not occurred, and on the Control Date there will not have occurred, any event which, with the lapse of time or the giving of notice, would result in any such default, except as set forth in Exhibit "L" attached hereto.

3.19 *No Stock Dividends or Stock Splits.* Since the date of the Financial Statements, neither Seller nor MD has declared or paid any cash dividend on the Shares nor any stock dividend on the Shares nor declared to be made any stock distribution or authorized the creation of or issued or authorized or effected any split of the Shares or any securities convertible into shares, or directly or indirectly redeemed, purchased or otherwise acquired any of their Shares or agreed to take any such action, and prior to the Control Date, Seller and/or MD will not cause, authorize, take or permit any of the foregoing actions, without the Buyer's prior written consent.

3.20 *Labor Law Compliance.* MD and Subsidiary have complied, and will so comply until the Control Date, with all applicable laws relating to of labor, including without limitation, any provisions thereof relating to wages, termination pay, vacation pay, fringe benefits, collective bargaining and the payment and/or accrual of same and all taxes, insurance and all other costs and expenses applicable thereto, and are not liable for any arrearages of same, or any taxes, costs or penalties for failure to comply with any of the foregoing except as set forth in Exhibit "M" attached hereto. Attached as Exhibit "M(1)" hereto is a list of all of the collective bargaining agreements to which MD and Subsidiary are parties.

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3.21 *Affirmative Action Plans.* Attached as Exhibit "N" is a list of those affirmative actions plans, judgments, conciliation agreements and/or consent decrees to which MD and/or Subsidiary is a party affecting the hiring, training or promotion of employees.

3.22 *Termination of Agreements.* There are no agreements (including without limitation, contracts with any officer, employee or representative) existing, and on the Control Date no such agreements will exist, between Seller, MD and/or Subsidiary and any person, organization or entity which cannot be terminated upon 30 days notice or less without premium, penalty or liability, except to the extent set forth in Exhibit "O" attached hereto and those agreements listed and set forth in accordance with Section 3.20 of this Stock Purchase Agreement.

3.23 *Operating Rights.* MD and Subsidiary now own, and on the Control Date will own, free and clear of all encumbrances, all of the existing rights, licenses and authorities (hereinafter referred to as the "Operating Rights") including without limitation, those described in Exhibit "P" attached hereto, issued to it by the Regulatory Authorities and the same have been validly issued and are now, and on the Control Date will be, in good standing.

3.24 *Property Maintenance.* MD and Subsidiary have maintained all of their real and personal property in good and proper operating condition, maintenance, order and repair in accordance with all laws, ordinances, zoning ordinances, rules, regulations and standards, including without limitation, those of the Regulatory Authorities and have made or accrued and until the Control Date will make or accrue, all necessary costs and expenses required to maintain same, except that set forth in Exhibit "Q" attached hereto. The market value of all property on the Control Date will not be less than its respective individual net book value, except for that property set forth in Exhibit "Q(1)" attached hereto for which an accrual has been established equal to the cost

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of rendering such equipment to the condition required herein, or which have been designated for sale as being not worth the cost of repair.

3.25 *Shares of Subsidiary.* MD now has, and on the Closing Date will have, good and valid title to the shares of Subsidiary, free and clear of any and all liens, charges and encumbrances whatsoever.

3.26 *Disclosures and Omissions.* Any facts known to Seller which Seller reasonably believes may be important to Buyer have been and subsequent to the execution of this Stock Purchase Agreement will be promptly communicated in writing by Seller to Buyer.

3.27 *Survival of Representations, Etc.* All of the representations, covenants, guarantees and warranties of Seller, MD, Subsidiary and Buyer under this Stock Purchase Agreement shall survive the closing of this Stock Purchase Agreement and any investigation at any time made by Buyer.

4.0 *BREACH OF REPRESENTATIONS, COVENANTS, GUARANTEES AND WARRANTIES.* If a breach, or non-fulfillment, of any material term, condition, representation, covenant, guarantee or warranty contained in this Stock Purchase Agreement (provided, however, breach of any part of Paragraph 3.0 shall be deemed material) shall occur prior to the Closing Date, Buyer shall have the right to elect to waive the breach, or non-fulfillment, of any such term, condition, representation, covenant, guarantee or warranty and complete this transaction, preserving any rights in damages it may have at law, in equity and/or pursuant to this Stock Purchase Agreement or, at its option, Buyer shall have the right to terminate this Stock Purchase Agreement without any liability and all payments made by Buyer shall be refunded, provided, however, that Buyer may not terminate this Stock Purchase Agreement without notifying Seller by fifteen (15) days prior written notice that a material breach of

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this agreement has occurred. Thereafter, Seller may cure its default and prohibit Buyer from terminating this Stock Purchase Agreement if Seller shall commence its cure of such breach within ten (10) days from date of notification of breach and continue its cure diligently thereafter until completion within sixty (60) days of such notice. If a cure is continuing but uncompleted on the date that would otherwise be the Closing Date, the Closing Date shall be the next business day following the sixty (60) day cure period. If the parties are in dispute as to whether breach of this agreement has occurred or whether Seller has made appropriate and timely cure, such questions of contract interpretation and compliance shall be submitted for declaratory judgment or ruling to the Macomb County Circuit Court, Macomb County, Michigan in accordance with Paragraph 27.1.

5.0 *APPLICATIONS TO GOVERNMENTAL AGENCIES.*

5.1 *Due Diligence.* The parties will, with due diligence and in good faith, and at their own cost and expense, fully cooperate with each other in the preparation, filing and prosecution of the appropriate applications with the Regulatory Authorities seeking approval of the transaction contemplated by this Stock Purchase Agreement, to the extent they have jurisdiction, and at the option of Buyer, approval for the temporary authority to control MD and Subsidiary through management ("Temporary Authority"), for the maximum period the Regulatory Authorities shall authorize.

5.2 *Expense of Applications.* At its own expense, Seller shall cause MD and Subsidiary to furnish or cause to be furnished all information, material and services necessary and/or appropriate in the preparation, filing and prosecution to final determination of all of the above-described applications and proceedings. Buyer shall bear the expense of filing fees incidental to filing such applications. Buyer and Seller shall each be responsible for the fees and expenses of their own attorneys.

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6.0 *GRANT OF TEMPORARY AUTHORITY.*

6.1 *Control Date.* Within five (5) business days from the later of the date Seller delivers to Buyer the final materials necessary for an application to the Interstate Commerce Commission ("ICC") for Temporary Authority and the date GLS LeasCo, Inc. elects under Paragraph 2.1 of the stock purchase agreement referred to in Paragraph 16.5 to perform under that agreement, Buyer shall file with the ICC an application for grant of Temporary Authority as set forth in Section 5.0 of this Stock Purchase Agreement. If Buyer shall seek and receive a final and effective Order of the Regulatory Authorities granting Temporary Authority to Buyer, without limitations, conditions or restrictions (or if Buyer waives in writing such limitations, conditions or restrictions) Buyer shall within ten (10) days from date of receipt of the Order, exercise the Temporary Authority granted thereby. The date Buyer shall exercise said Temporary Authority is herein defined as the "Control Date". Buyer shall give Seller no less than twenty four (24) hours notice of the date so selected.

6.2 *Period of Temporary Authority.* The period of such Temporary Authority shall commence on the date on which Buyer exercises such Temporary Authority and terminate on the date as may be thereafter designed by the Regulatory Authorities.

6.3 *Books, Records, Etc.* On the date of execution hereof, Seller shall make available to Buyer the minute books, record books and by-laws of MD and Subsidiary and shall deliver to Buyer a non-revocable proxy to vote the Shares during the period that Buyer shall be in Temporary Authority. Seller shall have access to those records of MD and Subsidiary necessary to determine any tax liability of Seller upon reasonable prior notice.

6.4 *Conduct of Operations.* During the period of such Temporary Authority, Buyer shall have absolute and exclusive right to control, supervise, manage and operate MD and Subsidiary until the date that the Regulatory Authorities shall designate that the Temporary Authority granted to Buyer shall be terminated sub-

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ject to those limitations set forth in Paragraph 12.0 of this Stock Purchase Agreement.

7.0 *DENIAL OF TEMPORARY AUTHORITY.* If, by their final and effective Orders, the Regulatory Authorities shall deny any Temporary Authority application, or grant said application subject to conditions, limitations or restrictions which are not acceptable to Buyer, then the parties hereto shall nonetheless continue to prosecute the final applications. Nothing contained in this Paragraph 7.0 shall be construed to limit the right of Buyer to seek reconsideration of any Order of the Regulatory Authorities denying or conditionally approving said application.

8.0 *DENIAL OF FINAL ORDER.*

8.1 *Appeal of Final Order.* If Buyer shall have been in Temporary Authority of MD and Subsidiary as contemplated herein and thereafter the Regulatory Authorities shall, by their final and effective Orders, deny, or approve this transaction subject to conditions, limitations or restrictions not acceptable to Buyer, Buyer shall have the right to, but shall not be obligated to, file an appeal seeking reversal or modification of said Orders. Seller, MD and Subsidiary shall join with Buyer in such appeal and fully cooperate with Buyer in the prosection thereof.

8.2 *Assignment of Agreement.* If Buyer shall elect not to appeal, or in the event that it shall do so and such appeals are unsuccessful, Buyer shall have a ninety (90) day period, commencing with the effective date of such denial of the final Order of said Commission or Court, or such restrictive or conditional approval Order, as the case may be, to assign all of its right, title and interest in, to and under this Stock Purchase Agreement. If Buyer shall make such assignment, it shall do so with recourse and the assignee shall then be required to consummate the purchase as provided herein within sixty (60) days following the date of such assignment. Seller shall fully cooperate with Buyer's assignee to the same degree and extent as it is required to do with Buyer in connection with the consummation, and shall be bound

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to Buyer's assignee with respect to their agreements, representations, covenants, guarantees and warranties set forth in this Stock Purchase Agreement. Buyer shall also have the right to make such assignment at any time pending determination of the applications filed with the Regulatory Authorities. In the event Buyer exercises its right of assignment, it shall not be relieved of any of the obligations, duties, payments, or liabilities incurred in accordance with the terms and provisions of this agreement and seller shall have full recourse against Buyer, notwithstanding notification of assignment by Buyer.

9.0 *CLOSING DATE*. The Closing Date is hereby defined to be that date within forty-five (45) days after the effective date of the latest of the administratively final and effective Orders of the Regulatory Authorities approving the transactions in the manner contemplated under this Stock Purchase Agreement as Buyer shall, by three (3) days written notice to Seller, designate and elect; provided, however, that if the Order shall be appealed, the Closing Date shall be forty-five (45) days from the date of a favorable determination of the appeal.

10.0 *CLOSING*. The place and manner of closing this transaction shall be as follows:

10.1 *Place of Closing*. The Closing shall occur at a place mutually agreed to by the parties.

10.2 *Share Transfers and Resignations*. Within three (3) business days of the date of execution hereof, Seller shall deliver to Escrow Agent not less than fifty-one (51%) percent of each class of the Shares (or such greater amount as is necessary for control of the corporation), properly endorsed and/or with separate transfers executed and signatures guaranteed by a bank authorized to do business in the State of Tennessee or a licensed stock brokerage company (the balance of the Shares shall be delivered forty-five (45) days after the date of execution of this Stock Purchase Agreement or such other date as Buyer and Seller

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may mutually agree); resignations of all shareholders occupying corporate officer positions and members of the Board of Directors serving as of the date of execution hereof and/or the Control Date, and written instructions to all banking institutions at which MD and/or Subsidiary maintained accounts that such officers and directors shall no longer be authorized signatories to any bank accounts of MD and/or Subsidiary respectively, along with executed copies of the Escrow Agreement attached hereto as Exhibit "R" ("Escrow Agreement"); copies of the Articles of Incorporation that will constitute Exhibit "C" along with the opinion of Seller's counsel that such Articles accurately describe the relative rights of all shareholders in MD and Subsidiary subject to all applicable laws. If the documents required under this Paragraph 10.2 are not delivered to Buyer within the time required herein, Buyer may declare this Stock Purchase Agreement null and void and all monies already paid by Buyer to Seller shall be returned to Buyer immediately.

10.3 *Additional Closing Items.* In addition, Seller shall also deliver to Buyer the following:

10.3.1 The Opinion of general counsel for Seller, as referred to in paragraph 16.1 hereof; and

10.3.2 Such affidavits, declarations and/or certificates as counsel for Buyer may reasonably require.

10.3.3 A valid, non-revocable proxy authorizing Buyer to vote the Shares and all shares of Subsidiary.

10.3.4 Such other documents as may be required to perfect transfer of all Shares of MD and/or Subsidiary.

11.0 *OPERATION OF COMPANY BY SELLER.* Between the execution date hereof and the Control Date, Seller, MD and Subsidiary will:

11.1 *Monthly Financial Statements.* Cause to be delivered to Buyer copies of the monthly financial statements of MD and

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Subsidiary by the twenty-fifth (25th) day of each month for the preceding month;

11.2 *Inspection of MD and Subsidiary.* Make available to Buyer for its inspection all of the books, records, property and all reports and returns of MD and/or Subsidiary which they shall file or have filed with any federal, state or municipal bureau, agency, commission or the Regulatory Authorities, and permit Buyer to conduct a study of MD's and Subsidiary's business and operations;

11.3 *Condition of Equipment.* Cause MD and Subsidiary to maintain all of its equipment, including without limitation, motor vehicles, trailers and other equipment, owned or leased, in good repair, maintenance, operating, roadworthy and useable condition and in compliance with all governmental rules and regulations, except that equipment listed on Exhibit "S" attached hereto, and cause MD and Subsidiary to maintain all of its other properties and assets, in good repair and operating, maintenance and useable condition and in compliance with all governmental rules and regulations. All vehicles and equipment designed for moving over roadways shall have tires with a remaining tread depth of not less than fifty (50.0%) percent on the average with respect to each such vehicle and equipment.

11.4 *Cancellation of Rights, Licenses or Franchises.* Not perform any act, or fail to perform any act, which will result in the suspension, limitation, revocation or cancellation of any of the Operating Rights of MD or Subsidiary, or any other rights, licenses or franchises of MD and/or Subsidiary;

11.5 *Miscellaneous.* Not permit MD or Subsidiary to:

11.5.1 Lease or consolidate with or merge into any other corporation or sell, lease or otherwise dispose of all or substantially all of the assets of MD or Subsidiary;

11.5.2 Guarantee the payment or performance of any liability or any obligation of any other entity or person, except endorse-

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ment in the ordinary course of business of negotiable instruments for collection;

11.5.3 Lend money or pledge or otherwise encumber any of its properties or assets, except for necessary encumbrances for operating capital;

11.5.4 Increase salaries by more than ten (10.0%) percent per annum, except pursuant to labor union agreements already agreed to;

11.5.5 Enter into any contract, other than for ordinary and necessary current operating supplies and services, without the written consent of Buyer;

11.5.6 Change its capital structure; or

11.5.7 Amend its articles of incorporation or by-laws except as a step to accomplishing the change in operations contemplated by Buyer;

11.5.8 In addition, MD and Subsidiary shall elect, for tax purposes, to carry forward its net operating loss for any fiscal year ending after the date of execution hereof or thereafter to subsequent years.

11.5.9 Elect any new members to the Board of Directors or elect or appoint any new Officers.

12.0 *OPERATION OF COMPANY BY BUYER.* Between the Control Date and the Closing Date, Buyer, MD and Subsidiary will:

12.1 *Inspection of MD and Subsidiary.* Make available to Seller for its inspection all of the books, records, property and all reports and returns for MD and/or Subsidiary which they shall file or have filed with any federal, state or municipal bureau, agency, commission or the Regulatory Authorities;

12.2 *Condition of Equipment.* Cause MD and Subsidiary to maintain all of its equipment, including without limitation, motor

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vehicles, trailers and other equipment, owned or leased, in the condition as the same exists on the Control Date, reasonable wear and tear accepted.

12.3 *Cancellation of Rights, Licenses or Franchises.* Not perform any act, or fail to perform any act, which will result in the suspension, limitation, revocation or cancellation of any of the Operating Rights of MD and/or Subsidiary.

12.4 *Miscellaneous.* Not permit MD or Subsidiary to:

12.4.1 Guarantee the payment or performance of any liability or any obligation of any other entity or person, except for the endorsement in the ordinary course of business of negotiable instruments for collection;

12.4.2 Lend money or pledge or otherwise encumber any of their properties or assets, except for necessary encumbrances for operating capital;

12.4.3 Increase salaries by more than ten (10.0%) percent per annum, except pursuant to labor union agreements;

12.4.4 Enter into any agreement to last longer than thirty (30) days, other than for necessary current operating supplies and services, without the written consent of Seller;

12.4.5 Change its capital structure except as a step to accomplishing the change in operations contemplated by Buyer; or

12.4.6 Amend its charter or by-laws except as a step to accomplishing the change in operations contemplated by Buyer.

12.5 *Return of MD and Subsidiary to Seller.* If Buyer shall return control of MD and Subsidiary to Seller, MD and Subsidiary shall not have a book value net worth lesser or greater than their book value net worth at the close of business on the Control Date.

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13.0 *PAYMENT OF PURCHASE PRICE*. If the Purchase Price has been finally and validly determined on the Closing Date by a proper Examination in accordance with the terms, conditions and provisions of this Agreement, the Purchase Price shall be paid as provided in Paragraph 1.0, after adjustment pursuant to the Stock Purchase Agreement.

If, on the Control Date, the Purchase Price has not been determined, a tentative Purchase Price shall be arrived at based upon the unaudited consolidated financial statements of MD and Subsidiary as of their last accounting period (but such period shall not be as of a date more than five (5) weeks prior to the Control Date) and Buyer shall deposit in escrow with the Escrow Agent in cash a sum equal to Fifty (50%) Percent of such tentative Purchase Price less the Deposit.

If, on the Closing Date, the Purchase Price has still not been determined, a tentative Purchase Price shall be arrived at based upon the unaudited consolidated financial statements of MD and Subsidiary as of the end of business on the Control Date and Buyer shall deposit in escrow with the Escrow Agent a Promissory Note equal to Fifty (50%) Percent of such amount. If Fifty (50%) Percent of this tentative Purchase Price less the Deposit shall be in excess of the cash deposited in escrow less the Deposit, the difference shall be remitted to Buyer in cash by the Escrow Agent within seven (7) business days following the calculation of this tentative Purchase Price and notification to the Escrow Agent. If Fifty (50%) Percent of the tentative Purchase Price less the Deposit shall be less than the money in escrow, Buyer shall within seven (7) business days following the calculation of this tentative Purchase Price and notification to the Escrow Agent pay in cash to Escrow Agent in escrow the amount necessary to cause the sums in escrow to equal Fifty (50%) Percent of this tentative Purchase Price.

Within seven (7) business days following the determination of the agreed upon, final, valid Purchase Price pursuant to the

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Examination, Buyer shall execute an allonge increasing or decreasing the principal balance of the Promissory Note in accordance with the Examination. If upon Examination, the final valid Purchase Price shall be less than the cash deposited by Buyer, (i) the Escrow Agent shall within seven (7) business days following the determination of the agreed upon final, valid Purchase Price pursuant to the Examination remit to Buyer from the Escrow created hereunder any amounts in excess of the Purchase Price and (ii) Seller shall (if Buyer shall already have paid to Seller more than the final, valid Purchase Price) remit to Buyer an amount equal to such payments in excess of the Purchase Price. Any income earned on monies held in escrow shall be divided among Seller and Buyer in accordance with their respective rights to the principal portion of such monies. All fees of the Escrow Agent shall be divided equally between Buyer and Seller.

14.0 *ACCOUNTS RECEIVABLE.*

14.1 *Best Efforts.* Buyer shall cause MD and Subsidiary to collect all accounts receivable held by MD and/or Subsidiary on the Control Date ("Accounts Receivable") by taking such reasonable efforts as an ordinary and prudent businessman operating in the same or similar business would take with respect thereto.

14.2 *Payment for Accounts Receivable.* Upon determination that any part of the Accounts Receivable is aged more than one hundred (100) days from the date of such invoice or pro bill, as of the Control Date without collection ("uncollectible"), Buyer shall have the right to cause MD and Subsidiary to notify Seller of such determination. Any trade Accounts Receivable arising from transactions occurring prior to the Control Date which are subsequently determined to be uncollectible shall, to the extent that the total of such Accounts Receivable exceed the reserves for uncollectible trade Accounts Receivable established as of the Control Date, be paid to Buyer by Seller. Thereupon, Buyer shall cause MD and Subsidiary to assign such trade Accounts Receivable and any other Accounts Receivable deemed uncollectable to

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Seller. Thirty (30) days thereafter, but in no event prior to the Closing Date, Seller shall pay to Buyer, in cash, an amount equal to such Accounts Receivable so assigned, or direct Escrow Agent to remit such amount from the cash in escrow. Seller shall thereupon have the right to seek to collect such Accounts Receivable from the respective debtors thereon by lawful means, at the cost and expense of Seller. Any attempts at collection shall be in the name of Seller as assignee of MD and Subsidiary and shall not be brought in the name of MD or Subsidiary.

14.3 *Cooperation.* Buyer shall cause MD and Subsidiary (i) to cooperate in a reasonable manner with Seller, at Seller's written request, in the collection of the Accounts Receivable so assigned, and (ii) to make available on request the original or verified copies of invoices, bills of lading and other documents appropriate to verify any portion of the transactions from which such assigned Accounts Receivable arose. Seller shall reimburse Buyer for Buyer's reasonable costs or expenses incurred in fulfilling its obligation to cooperate in the collection of that portion of the Accounts Receivable assigned to Seller.

14.4 *Credit of Accounts.* Buyer shall have the option of not assigning certain Accounts Receivable to Seller.

15.0 *RESTRICTION ON COMPETITION.* In recognition that a material part of the consideration is the promise of stockholders/officers/directors E. William King and/or John R. King not to compete with Buyer, MD and/or Subsidiary in the freight business for a period equal to the lesser of (a) two (2) years from last day of employment of either of such persons as to that person if employed by MD, or two (2) years from the date of execution of this Stock Purchase Agreement, or (b) the longest period of time following the Closing Date allowed by law as determined by a court of competent jurisdiction and venue, Messrs. King shall not directly or indirectly, own, manage, operate, control or participate in the ownership, management, operation or control of or be connected as an officer, consultant,

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* Note

partner, director, shareholder, adviser or otherwise in the conduct of any business or businesses which compete with any business conducted by Buyer, MD and/or Subsidiary. This covenant is restricted geographically to (i) the States in which MD and/or Subsidiary carry on business at the date of execution hereof, or if this covenant is found to be unenforceable by a final, unappealable order of a court of competent jurisdiction and venue, (hereinafter referred to as "Unenforceable") (ii) within one hundred (100) mile radius of the states in which MD or Subsidiary own or lease and/or use a so-called terminal facility, or if Unenforceable, (iii) the State of Tennessee, or if Unenforceable (iv) the largest geographic area from which such competition may be restricted. This covenant also prohibits soliciting for business and servicing any customers of MD or Subsidiary regardless of their geographic location. In recognition of the difficulty of determining damages for violation of this covenant, MD and Subsidiary shall be entitled to injunctive relief for the violation hereof, in addition to such other relief as may be available to them at law, in equity, or under this Agreement. All costs of any nature whatsoever incurred by Buyer, MD and/or Subsidiary in successfully enforcing this Paragraph, including without limitation, attorneys fees, shall be paid by Messrs. King. If any provision hereunder shall be deemed to be contrary to law, the remainder of this provision shall constitute the agreement between the parties. Anything to the contrary notwithstanding, this Paragraph shall survive the termination or earlier cancellation of this Agreement. If the law of any one of the states listed above would cause this Paragraph to be unenforceable in that state, then the law of another state allowing enforcement of this provision shall be the law applicable to this Paragraph or if Unenforceable the portion of this Paragraph found to be unenforceable shall be severed from this Agreement and the remaining provisions of this Paragraph shall continue in full force and effect. This provision is not intended to restrict Messrs. King from owning any real estate or improvements which are leased or rented.

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* Note

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16.0 *CONDITIONS PRECEDENT TO CLOSING BY BUYER.* The obligation of Buyer to close the transaction herein contemplated is subject to the following express conditions precedent:

16.1 *Opinion of Counsel.* Buyer shall have received a written opinion of the general attorneys for Seller dated as of the Control Date and the Closing Date, that:

16.1.1 As of such dates, MD and Subsidiary are duly incorporated, validly existing and in good standing under the laws of Tennessee and are qualified to transact business in all other states in which such qualification is required;

16.1.2 As of the Closing Date, the authorized and issued capital stock of MD and Subsidiary is as set forth in the recitals and Exhibit "A" attached hereto as the same may be revised without affecting the number of Shares Buyer is purchasing hereunder or the amount or equity or control they represent;

16.1.3 All of the said issued capital stock has been validly issued and is fully paid and non-assessable, and to the best of such counsel's knowledge, no one will have any rights by way of option, subscription, contract or otherwise to purchase or otherwise acquire any of the issued or unissued Shares or other securities of MD and/or Subsidiary;

16.1.4 The execution of this Agreement and the performance of the covenants and conditions herein contained, including without limitation, consummation of the sale of the Purchased Shares, does not and will not constitute or result in the violation of any of the terms, conditions or provisions of, or constitute a default under, or result in the creation of, any lien, charge or encumbrance on any property or assets of MD and/or Subsidiary pursuant to any provisions of law, Articles of Incorporation, or by-laws of MD or Subsidiary or any agreement or other instrument to which they are a party or by which they may be bound or affected. In lieu thereof, counsel's opinion may include as an

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attachment written approval of the transaction by any lending institution which has or may have a contractual right to pre-approve any sale, without penalty or cost to Buyer, MD and/or Subsidiary for such approval;

16.1.5 The properties and assets of MD and Subsidiary are not restricted from use, development or resale, except as disclosed in Exhibit "T" attached hereto;

16.1.6 Such counsel has no knowledge of any litigation, proceeding or controversy, pending or threatened, against or affecting Seller, MD or Subsidiary or any of their business, properties or assets as of the control Date and the Closing Date, other than as set out in Exhibit "G" hereof, none of which, in the opinion of such counsel, could materially or adversely affect the business, properties or condition, financial or otherwise, of MD or Subsidiary; and

16.1.7 There are no stock transfer taxes or the like due as a result of the sale of the Purchased Shares contemplated herein.

16.1.8 The terms of this Stock Purchase Agreement are fully enforceable as written under Tennessee law.

16.2 *Continuation of Business.* Between December 31, 1982 and the Control Date, MD and Subsidiary shall not have suffered any damage or destruction, whether covered by insurance or not, which may materially or adversely affect the continuation or conduct of its business.

16.3 *Action or Proceeding.* No action or proceeding shall have been instituted or threatened against MD or Subsidiary prior to the Control or Closing Date which may materially or adversely affect their business, properties, assets, rights or financial condition, and no action or proceeding shall have been instituted or threatened prior to the Control or Closing Date before any court or governmental agency to restrain or prohibit, or to obtain damages in respect of, this Stock Purchase Agreement or the consummation of the transaction contemplated herein which, in

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* Note

the reasonable opinion of Buyer, would decrease the book value net worth of MD and Subsidiary by an amount in excess of Eight Hundred Thousand ($800,000.00) Dollars.

16.4 *Waivers.* Buyer may waive one or more of said conditions but such waiver shall be effective only if in writing and signed on behalf of Buyer by one of its duly authorized officers and may be conditioned in any manner Buyer sees fit.

16.5 *Related Agreement.* Not less than shareholders representing ninety-nine (99%) Percent of the stock of Crown shall have entered into and closed a stock purchase agreement with GLS LeasCo, Inc. for the purchase of all of the capital stock of Crown by GLS LeasCo, Inc. and such agreement shall not be in default.

17.0 *CONDITION PRECEDENT TO CLOSING BY SELLER.* Seller shall have received a written Opinion of Simpson & Moran, counsel for Buyer, dated as of the Closing Date that:

17.1 *Incorporation.* As of the Closing Date, Buyer is a corporation duly incorporated, validly existing and in good standing under the laws of Michigan; and

17.2 *Lawful Execution.* The execution of the Stock Purchase Agreement and the performance of the obligations of Buyer hereunder shall not constitute a default under any agreement or instrument to which it is a party or by which it may be bound or affected.

18.0 *DEFAULT.* Except as specifically set forth herein concerning rights in default, if any party shall be in default hereunder, the non-defaulting party shall have the right to specifically enforce this Stock Purchase Agreement in addition to and not in derogation of its rights in law, at equity or under this Stock Purchase Agreement.

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19.0 *SELLER'S INDEMNIFICATION.* Seller hereby indemnifies and holds harmless Buyer, MD and Subsidiary and each of them against and from any and all liability or obligation of whatsoever kind or nature resulting:

19.1 *Claim or Action.* From or by virtue of any claim or action whatsoever against MD and/or Subsidiary based on any act, occurrence or transaction whatsoever which occurred or arose prior to the Control Date, except to the extent that such claims or actions are reserved against at closing in the Examination or are fully covered by insurance. To the extent claims or actions existing at closing are not fully reserved against or fully insured for any reason, Seller shall indemnify Buyer up to the full extent of the Purchase Price for any loss or costs incurred in the defense thereof. If such claims or actions are fully reserved against or fully insured, parties agree that Buyer shall look only to such reserves and insurance to cover any losses or costs related thereto. Seller shall be entitled to any unused reserves as follows:

19.1.1 *Claims Liquidated As Of Closing Date.* For any claim or contingency which, as of the Closing Date, has been liquidated, by agreement or other means, to an amount less than the reserve established to cover such item, Seller shall be entitled to receive the unused excess reserve. Buyer shall tender such unused reserves to Seller within seven (7) business days after the Closing Date.

19.1.2 *Claims Liquidated After the Closing Date.* With respect to any claim or contingency which is liquidated after the Closing Date but within six (6) years from the Closing Date, Buyer shall tender to Seller any unused excess reserve within fifteen (15) days after such liquidation.

19.1.3 *Expiration of Statute of Limitations.* In the event the applicable statute of limitations expires with respect to any claim or contingency for which a reserve was previously established, Seller shall be entitled to receive any such unused excess reserves

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upon delivery to Buyer of the written opinion of Seller's counsel confirming the expiration of the applicable statute of limitations and the barring of any subsequent litigation against MD or Subsidiary with respect to such matter.

19.1.4 *Claims Remaining Outstanding Six Years from Closing Date.* In the event certain claims or contingencies remain outstanding as of the sixth anniversary of the Closing Date and Seller is not able to deliver a written opinion of Seller's counsel as to the expiration of the applicable statute of limitations, Buyer shall retain all applicable unused reserves and Seller shall make no subsequent demand therefor.

19.2 *Breach or Non-Fulfillment.* From the material breach or non-fulfiliment of any of the representations, warranties, covenants, guarantees, conditions and/or agreements as herein set forth not otherwise cured in accordance with the provisions of Paragraph 4.0 of this Stock Purchase Agreement.

20.0 *BUYER'S INDEMNIFICATION.* Except as otherwise provided herein, Buyer shall indemnify Seller from any and all liability arising from any event, occurrence, act, commission or omission of Buyer in operating MD and/or Subsidiary under this Stock Purchase Agreement based on facts arising after the Control Date.

21.0 *BROKER.* Seller hereby indemnifies and holds Buyer harmless from any liability to any finder, broker or agent for any finder's fee, broker's fee or commission arising out of actions of Seller with respect to the transaction contemplated in this Stock Purchase Agreement. Buyer represents that it has engaged the services of no broker in respect to the transaction contemplated in this Stock Purchase Agreement.

22.0 *DENIAL OF FINAL ORDER.*

22.1 *Net Profits or Losses.* In the event of the issuance of any final and effective denial Order or conditional approval Order referred to in Paragraph 8.0 above, and thereafter any court

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appeals, if taken therefrom, shall be unsuccessful and Buyer shall not have made an assignment of this Stock Purchase Agreement resulting in a closing, as provided for in Paragraph 8.2 above. Buyer shall then be entitled to be paid all net profits which MD and Subsidiary shall have accumulated during the Temporary Authority period, but if losses shall have occurred, Buyer shall be required to reimburse MD and Subsidiary for such losses. Such net profits shall be determined without regard to any income tax loss-carryforward.

22.2 *Other Requirements.* In such event, Buyer shall also be required to:

22.2.1 Terminate the Temporary Authority;

22.2.2 Surrender control of MD and Subsidiary to Seller;

22.2.3 Return to Seller all of the books and records of MD and Subsidiary;

22.2.4 Cancel the non-revocable proxy; and

22.2.5 Deliver to Seller the resignations of all officers and directors of MD and Subsidiary.

23.0 *CONTROL DATE.* Whenever "Control Date" is referred to in this Stock Purchase Agreement, said date shall be deemed to be and shall be construed as being the Closing Date in the event that Buyer shall not have assumed Temporary Authority through management of MD and/or Subsidiary.

24.0 *ASSIGNMENT OF AGREEMENT.* Buyer shall have the right to assign this Stock Purchase Agreement to a financially responsible affiliated company without the prior consent of Seller and with full recourse by Seller to Buyer. In the event Buyer shall exercise its right of assignment, it shall give written notification to Seller of said assignment and shall execute such formal undertakings or documents of full recourse as Seller may reasonably require.

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25.0 *ESCROW.* Seller shall deposit with the Escrow Agent, pursuant to the Escrow Agreement on the date specified in Paragraph 10.2 of this Stock Purchase Agreement, all certificates representing the Shares, properly signed, endorsed and witnessed (or certificates with Assignment Separate from Certificate forms properly signed, endorsed and witnessed) conveying the Shares to Buyer conditioned only upon payment of the Purchase Price as determined hereunder.

26.0 *NOTICES.* Any notice to be given or made hereunder shall be in writing and shall be deemed to have been served if delivered personally or mailed by prepaid, registered mail to the parties as follows:

To Seller: Mr. E. William King
The Mason and Dixon Lines, Inc.
Post Office Box 969
Kingsport, Tennessee 37662

To Buyer: M. J. Moroun, Director
CENTRAL TRANSPORT, INC.
34200 Mound Road
Sterling Heights, Michigan 48077

and:

R. W. Lech, Executive Vice-President
CENTRAL TRANSPORT, INC.
34200 Mound Road
Sterling Heights, Michigan 48077

Any notice so given or made shall be deemed to have been given or made on the earlier of the day of delivery or on the day of posting, as the case may be; provided, however, that any one of the parties may change its address by written notice to the other and in such event this Paragraph 26.0 shall be deemed amended accordingly.

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27.0 *CONSTRUCTION.*

27.1 *State Law.* This Stock Purchase Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Tennessee, provided that jurisdiction and venue shall be deemed to lie exclusively within the Macomb County Circuit Court, Macomb County, Michigan. In the event the Macomb County Court refuses to apply Tennessee law, this entire Paragraph 27.1 shall be deemed severed and the balance of the Stock Purchase Agreement shall be enforced. The parties hereto shall enter a consent judgment for entry of the decision of the arbitrator concerning the Examination as a judgment in such Michigan court.

27.2 *Captions.* Captions have been inserted for convenience and/or reference only and such captions shall not affect the construction or interpretation of any such section.

28.0 *RIGHT TO TERMINATE AND/OR WAIVE.* Anything to the contrary notwithstanding, should a material or adverse condition develop in MD or Subsidiary prior to the Closing Date which is not known or anticipated by the parties at execution hereof and which cannot be remedied by altering the accruals at Closing to reflect this condition or cured pursuant to Paragraph 4.0, Buyer shall have the right to terminate this Stock Purchase Agreement without liability and receive back all money paid towards the Purchase Price. Buyer shall have the right to terminate this Stock Purchase Agreement if GLS shall have the right to terminate the stock purchase agreement identified in Paragraph 16.5. Seller shall deliver all Exhibits required hereunder to Buyer on or before March 1, 1984. Execution of this Agreement shall not be deemed to be an acceptance of any Exhibit. Buyer shall have the right to cause Seller to amend any Exhibit for seven (7) days from the date of delivery of the last of such Exhibits delivered to Buyer. If such amendments are not made within ten (10) days of receipt by Seller of such demand, Buyer may declare this Agreement null and void and receive back all monies paid by

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Buyer to Seller. Buyer shall also have the right to terminate this Stock Purchase Agreement and declare the same null and void and receive back all monies paid by Buyer to Seller if Seller shall fail to deliver materials necessary for Buyer's application for Temporary Authority on or before December 26, 1983. In addition, Buyer shall have the right to waive the performance, in whole or in part, of any duty of Seller, MD or Subsidiary hereunder or to waive any term, condition or requirement of Seller, MD or Subsidiary without affecting any other duty, term, condition or requirement of Seller, MD or Subsidiary hereunder.

29.0 *MODIFICATION OF AGREEMENT.* This Stock Purchase Agreement, including the Exhibits hereto attached, constitutes the entire agreement between the parties hereto in respect of the transaction contemplated hereby, and there are not now and there shall not be any verbal statements, representations, warranties, undertakings or agreements between the parties. This Stock Purchase Agreement may not be amended or modified in any respect except by written instrument signed by all the parties hereto in accordance with appropriate corporate resolutions and corporate minutes. No party may use a prior draft of this Stock Purchase Agreement for any purpose, including without limitation, to suggest that a provision was deleted or added for any reason whatsoever.

30.0 *NON-REFUNDABLE DEPOSIT.* Anything in this Stock Purchase Agreement to the contrary notwithstanding, the Deposit is a non-refundable earnest money deposit, refundable only if Buyer has elected to cancel this Stock Purchase Agreement under Paragraph 10.2 and/or 28.0.

31.0 *NO OPTION; COUNTERPART SIGNATURES.* This Stock Purchase Agreement does not constitute an offer to purchase or to sell until the same is signed by all of the parties, either by the execution of one document or the execution of documents in counterpart which, when signed by all of the parties hereto, will be considered to be one fully executed document.

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* Note

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32.0 *BINDING EFFECTS.* This Stock Purchase Agreement shall be binding upon the parties hereto, their respective heirs, legal representatives, administrators, executors, successors and assigns.

33.0 *DEFINITIONS.* The following terms, unless context otherwise dictates shall be interpreted in accordance with the following definitions:

33.1 *Material and or Adverse.* Any condition, contingency, occurrence, event, omission or commission which if realized would result in a value of $50,000.00 or more, except as provided in Section 16.3. The Examination shall include all accruals and items without regard to materiality as defined in this Section 33.1.

33.2 *Shareholder.* Any person owning directly or indirectly stock in MD, provided however, such term shall only be applied in the context of this agreement to the stockholder in his/her capacity as a stockholder.

34.0 *HART-SCOTT-RODINO AMENDMENT.* In the event a waiting period is required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. §18a), or an exemption or compliance filing is required thereunder, delay in performance under this Stock Purchase Agreement for such purpose shall not be a breach hereunder.

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* Note

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date hereinabove set forth.

WITNESSES:

(s) James ?

(s) E Wm King
E. WILLIAM KING, individually and as Power of Attorney for those Sellers listed on Exhibit "U" attached hereto

(s) James ?

(s) John King
JOHN R. KING, individually and as Power of Attorney for those Sellers listed on Exhibit "V" attached hereto

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_____
"Seller"

THE MASON AND DIXON LINES, INCORPORATED, a Tennessee corporation

(s) James ?

BY: (s) E Wm King

(s) Norman E. Harned

Its: Chairman
"MD"

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THE MASON AND DIXON TANK LINES, INC., a Tennessee corporation

(s) John R. King

BY: (s) ?

(s) Norman E. Harned

Its: Chairman
"Subsidiary"

CENTRAL TRANSPORT, INC., a Michigan corporation

(s) James ?

BY: (s) R. W. Lech

(s) Norman E. Harned

Its: Executive Vice-President
"Buyer"

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* Note — Initials of J.R.K. and R.W.L.

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EXHIBIT U

THE MASON AND DIXON LINES, INCORPORATED

E. WILLIAM KING AS SIGNATORY

	Shares
Voting Common (Class A) Stock	
Individually	1,800
Power of Attorney	
Elizabeth K. Griffin	180
Mary A. King Sullivan	180
TOTAL	2,160
Non-Voting (Class B) Stock	
Power of Attorney	
E. William King, Jr.	74
Elizabeth K. Griffin	581
Mary A. King Sullivan	561
The Suncrown Corporation as President	49
TOTAL	1,265

EXHIBIT V

THE MASON AND DIXON LINES, INCORPORATED

JOHN R. KING AS SIGNATORY

	Shares
Voting Common (Class A) Stock	
Individually	1,786
Power of Attorney	
Jennifer K. Ferreira	296
As Trustee for John Matthew King	20
TOTAL	2,002
Non-Voting (Class B) Stock	
As Trustee for John Matthew King	20
Power of Attorney	
Jennifer K. Ferreira	510
TOTAL	530

Appendix H

INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-F-15553 TA

CENTRAL TRANSPORT, INC.--CONTROL--THE MASON AND DIXON LINES, INCORPORATED AND THE MASON AND DIXON TANK LINES, INC.

Decided: December 27, 1983
(Service Date: Jan. 4, 1984)

On December 21, 1983, Central Transport, Inc., of Sterling Heights, MI, filed an application under 49 U.S.C. 11349 for temporary authority to operate through management and control the operating rights of The Mason and Dixon Lines, Incorporated and The Mason and Dixon Tank Lines, Inc., of Kingsport, TN, pending the final disposition of a concurrently filed finance application under 49 U.S.C. 11343-44.

Applicants have demonstrated that failure to grant the TA may result in destruction of or inury to transferor's motor carrier properties, or substantially interfere with their future usefulness in providing adequate and continuous service to the public. Accordingly, the TA should be granted. See 49 U.S.C. §11349(a).

This decision will not significantly affect the quality of the human environment.

It is ordered:

(1) Transferee is authorized to assume temporary control of transferor through management for a period of 180 days. However, pursuant to 49 C.F.R.1163.1, this authority shall be extended until final disposition of the related finance application for permanent authority, unless otherwise ordered by the Commission.

(2) The authority granted by this decision shall terminate unless, within 30 days of this decision's service date transferee shall have:

Appendix H

(a) assumed control of treansferor through management;

(b) confirmed this in writing to the Commission; and

(c) filed with the Commission 3 copies of the approved management agreement, if this has not previously been done.

By the Commission, the Review Board, Members Parker, Krock, and Dowell.

James H. Bayne
Acting Secretary

(SEAL)

Appendix H

INTERSTATE COMMERCE COMMISSION
NOTICE OF EFFECTIVENESS
MC-F-15553
CENTRAL TRANSPORT, INC. AND
GLS LEASCO, INC. — CONTROL —
THE MASON AND DIXON LINES, INCORPORATED
AND THE MASON AND DIXON TANK LINES, INC.
(SERVICE DATE MAR. 7, 1984)

Notice of a grant of authority in this proceeding was published in the ICC and Federal Register issues of January 17, 1984. Because no one opposed the grant of authority in this proceeding, or because the proceeding subsequently became unopposed, the published grant of authority is the final action of the Commission.

It is ordered:

1. The acquisition by Central Transport, Inc. and GLS Leasco, Inc. of control of the interstate operating rights and property of The Mason and Dixon Lines, Incorporated and The Mason and Dixon Tank Lines, Inc., upon the stated terms and conditions in the application and in the ICC and Federal Register Notices and the acquisition by CenTra, Inc. and in turn by T. J. Moroun and M. J. Moroun of Control of said rights and properties, are approved and authorized.

2. If the parties desire to consummate the transaction authorized in this notice, they shall (a) promptly comply with the administrative requirements indicated below:

Insurance (see 49 CFR 1043 for information);

Designation of agents for service of process and notice -- motor carriers or brokers (See 49 CFR 1044 for information);

Tariffs -- motor carriers, water carriers, or freight forwarders (See 49 CFR 1306-1310 for information);

and (b) confirm in writing to the Commission, within 15 days after consummation, the date that consummation actually took place.

3. If the parties desire to exercise the authority herein, they shall submit to the Commission an original and one copy of a sworn statement, within 60 days after consummation of the transaction, showing (a) all expenditures made or to be made, by dates, in connection with the authorized transaction, including any consideration, legal and other fees, commissions, and other costs incidental to the transaction, and (b) the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been, or is to be debited or credited.

4. This notice shall be effective on the date it is served.

5. Unless the authority granted herein is exercised within 90 days from the effective date of this notice, the decision granting the authority shall be of no further force and effect.

6. The temporary authority granted under this docket number pursuant to 49 U.S.C. 11349 shall be terminated on the date of consummation of the transaction or 90 days after the effective date of this notice, whichever occurs first.

Dated: March 2, 1984.

By the Commission, Heber P. Hardy, Director, Office of Proceedings.

James H. Bayne
Acting Secretary

(SEAL)

APPENDIX I

Miscellaneous

Appendix I

I.R.S. REVENUE RULING 68-601, I.R.D. 1968-47, 6

Advice has been requested whether warrants and convertible debentures constitute "options" under section 318(a)(4) of the Internal Revenue Code of 1954, and, if so, how this result applies to section 302(b)(2) of the Code.

A corporation had outstanding 1,000 shares of common stock of which *A* or *B* each owned 100 shares. No stock was constructively owned by either *A* or *B*. The corporation offered each of its shareholders a 1,000*x* dollar convertible debenture and a warrant to purchase 20 shares of its common stock in exchange for each 50 shares owned, but not to exceed one-half of each shareholder's common stock. Each debenture was convertible into 40 shares of the corporation's common stock. Only *A* and *B* accepted the offer and the exchange of 50 shares of the stock of each was effected in accordance with the terms of the offer.

The treatment of distributions in redemption of stock is governed by the provisions of section 302 of the Code. Pursuant to section 302(c)(1) of the Code, the constructive ownership rules of section 318(a) of the Code are applicable in determining the ownership of stock for purposes of section 302 of the Code. The question involved is whether the stock that could be acquired by *A* and *B* as a result of the exercise of the warrants and the conversion of the debentures will be attributed to them by virtue of the application of section 318(a)(4) of the Code, and, if so, whether their exchanges will be "substantially disproportionate redemptions" within the meaning of section 302(b)(2) of the Code.

Section 318(a)(4) of the Code provides, in part, that if any person has an option to acquire stock, such stock shall be considered as owned by such persons.

Section 318 of the Code does not define the term "option." Section 1.318—3(c) of the Income Tax Regulations, relating to options, does not outline the scope of the option attribution provision but simply contains an example of its application. The

example deals with an option between shareholders to purchase stock which is already issued and oustanding. No reference is made to options to acquire stock from the corporation.

In order for a warrant to acquire stock to qualify as an option, the holder must have the right to obtain the stock at his election. When this right to acquire stock exists, warrants or convertible debentures are not realistically different from options as referred to in section 318(a)(4) of the Code. In each instance, stock may be acquired at the election of the shareholder and there exist no contingencies with respect to such election.

Accordingly, under these circumstances the warrants to purchase stock, and the debentures which are convertible into stock, constitute options to acquire stock within the meaning of section 318(a)(4) of the Code.

In order to qualify as "substantially disproportionate," within the meaning of section 302(b)(2) of the Code, a redemption must satisfy the requirements of that section. Where a corporation has only one class of stock outstanding, this test requires that the percentage of the total outstanding voting common stock owned, directly and indirectly, by the shareholder immediately after the redemption be less than 80 percent of his percentage of ownership of such stock immediately before the redemption.

Section 1.302-3 of the regulations states, in part, that the constructive ownership of stock rules in section 318(a) of the Code "... shall apply both in making the disproportionate redemption test and in determining the percentage of stock ownership after the redemption." The regulations further provide that the requirements under section 302(b)(2) of the Code are applied to each shareholder separately with respect to stock which is issued and outstanding in the hands of the shareholders. No mention is made as to what shares, if any, that may be acquired through the exercise of options are to be considered as issued and outstanding stock for this purpose.

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Since the warrants and convertible debentures in this case constitute options under section 318(a)(4) of the Code, it is held that under section 302(b)(2) of the Code there should be considered as issued and outstanding, on a shareholder by shareholder basis without regard to the rights of unrelated shareholders to acquire unissued stock, those shares which a given shareholder may acquire by exercising his warrants and converting his debentures and those shares which that shareholder would constructively own by reason of other shareholders exercising their warrants and converting their debentures. In this connection, the Service will not follow the case of *J. Milton Sorem et al. v. Commissioner* (64-2 USTC ¶ 9610), 334 F. 2d 275 (1964), reversing and remanding [CCH Dec. 26,101] 40 T. C. 206 (1963), in regard to the issue of including in the total outstanding stock of the corporation options held by persons whose stock was not held directly nor indirectly by the redeeming shareholders.

In the instant case, *A* and *B* each owns after the redemption 50 shares of the corporation's common stock plus a warrant which may be exercised in order to obtain 20 shares of common stock and a debenture which may be converted into 40 shares of common stock. Thus, *A* and *B* each owns, actually and constructively, 110 shares of the corporation's stock after the transaction. The total outstanding stock of the corporation after the transaction for purposes of the computation under section 302(b)(2) of the Code, as applied to each shareholder separately, is 960 shares consisting of the 900 actual outstanding shares and the 60 shares which such shareholder could acquire by exercising his warrant and converting his debenture. Thus, *A* and *B* each owns 11.46 percent of the total outstanding common stock of the corporation after the exchange whereas *A* and *B* each owned 10 percent of such stock immediately before the transaction.

Accordingly, neither the distribution to *A* nor the distribution to *B* qualifies as a disproportionate redemption of stock within the meaning of section 302(b)(2) of the Code.

Appendix I

Citation
GCM 36176
0302.00-00
Distributions in Redemption of Stock V. Sale of Property
Constructive Ownership 0302.03-00
0318.00-00
Constructive Ownership of Stock
CC:I:I-902
Br5:RAF
December 19, 1972

In re: * * *

PETER P. WEIDENBRUCH, JR.
Assistant Commissioner (Technical)
Attention: Director, Income Tax Division

Reference is made to your memorandum (T:I:R:1) dated August 18, 1971, in which you referred a proposed revenue ruling based upon the above-captioned case to this Office for concurrence or comment.

ISSUE

Whether warrants which are non-exercisable for a specified period of time and under stated conditions constitute options within the meaning of the Int. Rev. Code of 1954, § 318(a)(4) [hereinafter cited as Code] for purposes of determining whether a redemption is substantially disproportionate under Code § 302(b)(2).

CONCLUSION

The proposed revenue ruling is primarily concerned with defining what is meant by "at his election" as that phrase was employed in Rev. Rul 68-601, 1968-2 C.B. 124. The proposed

ruling established one standard, that the passage of time before a warrant may be exercised will not change the fact that an option exists for purposes of Code § 318(a)(4), and one guideline, that any contingencies with respect to an election must be serious precedent conditions which could result in a substantial risk of forfeiture of the right to exercise the option. Although we are in full accordance with the conclusions reached in the proposed ruling, we believe some discussion of the issues is warranted. Furthermore, we have supplemented the facts of the proposed ruling in accordance with your administrative file with respect to when A may unconditionally exercise the warrants received in redemption for his stock.

FACTS

X Association, an unincorporated business trust, intended to qualify as a real estate investment trust (REIT) within the meaning of Code §§ 856-858. To be certain of X's compliance with the requirement of Code § 856(a)(6), that a REIT not be a personal holding company, an agreement and plan of redemption was entered into whereby 80,000 shares of X's common stock were redeemed from A for cash plus five-year renewable term warrants to purchase 80,000 shares of X common stock. Prior to the redemption, A owned 170,000 shares of X and also held other nonrestrictive warrants to acquire 98,000 shares of X. A planned to treat the transaction as qualifying under Code § 302(b)(2) as a substantially disproportionate redemption.

The terms of the warrants distributed in the redemption stated they were nonexercisable and nontransferable for a period of three years from the date of issuance and thereafter would be exercisable for two years only if the exercise would not endanger the REIT status of X under Code § 856(a)(6) as determined by the X trustees. If the warrants were not exercised at the end of the two-year exercise period due to the trustees' denial, the warrants would be renewed for a period of five-years and may be exercised

by A or his assigns on the earlier of the expiration of this five-year renewal period, or ninety days following the date of notification to A by X that exercise would not jeopardize X's status as a REIT under Code § 856(a).

ANALYSIS

Code § 318 was enacted to provide specific rules for the constructive attribution of stock ownership in the area of corporation distributions and adjustments in order to realistically measure the amount of shareholder ownership, and therefore control, of a corporation. As applied to Code § 302(b)(2), Code § 318 insures that the limitations embodied in Code §§ 302(b)(2)(B) and 302(b)(2)(C) are effectively applied, thereby resulting in a meaningful reduction in a shareholder's relative ownership of a corporation.[1]

Code § 318(a)(4) provides, in pertinent part, that "[i]f any person has an option to acquire stock, such stock shall be considered as owned by such person." Rev. Rul. 68-601 included within the scope of options for purposes of Code § 302(b)(2) warrants to acquire stock and convertible debentures.

We think it apparent that Congress had in mind when it enacted Code § 302(b)(2) not only a redemption that satisfied specific limitations, but also a redemption that insured that the redeeming shareholder sustained, with some degree of permanence, the required contraction of ownership. Stated otherwise, it

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[1]Inasmuch as a dividend normally does not affect the individual shareholder's relative ownership of a corporation, pro rata redemptions were usually treated as being "essentially equivalent to a dividend" under Int. Rev. Code of 1939, § 115(g). Conversely, non-pro rata redemptions generally were not considered dividends. Code § 302(b)(2) carries forth this distinction by defining exactly what will be considered a non-pro rata redemption for purposes of determining whether it will be treated as a dividend or distribution in exchange for the stock. See B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders 9-16 (3d ed. 1971).

was not intended that a redeeming shareholder be afforded favorable tax treatment on a redemption if thereafter he in effect maintains his prior equity position through stock the ownership of which he is deemed to possess because of a particular relationship with the actual owner or returns to his prior equity position through the exercise of an option.[2] If the redeeming shareholder maintains or returns through the existing option to his prior equity position, the redemption in effect has had no effect on the relative ownership of the corporation, and although affecting only one shareholder, is properly taxed as a dividend under Code §301. It is thus evident that the basic purpose for applying Code § 318 to Code § 302(b)(2) is to insure that the redeeming shareholder's contraction of ownership is more than a temporary occurrence designed simply to comply for the moment with Code §§ 302(b)(2)(B) and 302(b)(2)(C). The conclusion reached in Rev. Rul. 68-301 that stock warrants and convertible debentures, both mechanisms by which the shareholder can recapture his prior equity position, are options within the meaning of Code § 302(b)(2) is therefore squarely in line with the principle enumerated above.

With this analysis in mind, we view the problem as a balance between the effectiveness of Code § 302(b)(2) on the one hand and the concept of stock attribution on the other.

In our view, the effectiveness of Code § 302(b)(2) is jeopardized if stock warrants that are not immediately exercisable or exercisable upon the occurrence of an insubstantial condition precedent are not considered options under Code § 318(a)(4). We believe this is an acceptable application of the stock attribution rules. Thus, we concur in your statement that

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[2] The inverse of this conclusion is embodied in Code § 302(b)(2)(D) in which exchange treatment is denied to a redemption which in the aggregate is not substantially disproportionate to the shareholder.

[T]he passage of time before a warrant may be exercised will not change the fact that an option exists for purposes of section 318(a)(4) of the Code. We further agree that "at his election" as that phrase is used in Rev. Rul. 68-601 is to distinguish an option from a bi-lateral contract and has no bearing on the time of exercise. This conclusion is therefore not inconsistent with G.C.M. 30513, * * *, A-624918 (Feb. 14, 1958), in which it is stated that "[f]or purposes of section 318(a), a person does not have an option unless he can cause the sale to occur at his election."

In this regard, we have supplemented the facts of the proposed ruling to insure that it is clear that the taxpayer in this case ultimately can unconditionally exercise the warrants. The facts in your administrative file indicate that the taxpayer will be absolutely entitled to exercise the warrants upon the expiration of the five-year renewal period if the trustees do not approve the exercise at an earlier date. We believe this significant in that it removes any possibility for forfeiture of the right to exercise the warrants.

With respect to contingencies affecting the exercise of the warrants, this Office, in G.C.M. 30367, * * *, A-825203 (Nov. 15, 1957), considered whether stock that might be acquired by a redeeming shareholder pursuant to a purchase agreement should be attributed to him under Code § 318. The agreement stated that the redeeming shareholder would only be obligated to purchase the stock if he outlived the prospective vendor and if (with respect to one-half the shares) the other shareholders approved. We stated in this case that:

> [i]t is not believed that an agreement within the meaning of section 318 can constitute an option to purchase when the rights to acquire the stock are dependent on contingencies without the control of the buyer. * * * In such cases, the interest of the prospective purchaser would seem to be too remote to constitute an option for which attribution would be justified. To the extent that G.C.M. 30367 implies that any

contingency will render Code § 318(a)(4) inapplicable to redemptions under Code § 302(b)(2), it is hereby clarified.

We believe your conclusions are in line with the previously stated purpose of applying Code §318 to Code § 302(b)(2): to insure that the redeeming shareholder's contraction of ownership is meaningful in the sense that it is not merely a temporary reduction designed to take advantage of the favorable tax treatment afforded substantially disproportionate redemptions. Suggestions have been made, however, that a compromise solution would satisfy the requirements of Code § 302(b)(2). In 21 Tax Law 923 (1968), the American Bar Association Committee on Affiliated and Related Corporations (ABA Committee) recommended that Code § 318(a)(4) be amended to state that options that are not exercisable within three years of the date of determination of constructive stock ownership will not result in attribution if on such date the option is either subject to substantial contingencies beyond the control of the optionee or priced in excess of 150 percent of the fair market value of the underlying stock. The standard sought by the Committee is that of a significant present interest in the stock in question. While this recommendation is not without merit, we believe, as the ABA Committee apparently did, that substantive changes in this area would be best accomplished by statutory and regulatory amendments.

We believe it noteworthy that the present status of Rev. Rul. 68-601 itself is uncertain in light of Bloch v. United States, 261 F. Supp. 597, 18 A.F.T.R.2d 6191 (1966), aff'd, 386 F.2d 839 (per curiam), 21 A.F.T.R.2d 395 (5th Cir. 1967). In criticizing Sorem v. Commissioner, 334 F.2d 275, 14 A.F.T.R.2d 5131 (10th Cir. 1964),[3] rev'g 40 T.C. 206 (1963), the Bloch court stated that it would be reluctant to follow the Sorem rationale with respect to

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[3] Sorem stated in dictum that for purposes of applying the constructive ownership rules of Code § 318, employees who held stock options must be considered as owning the stock for which they held options.

option attribution, alluding to the fact that Treas. Reg. § 1.318-3(c) might be interpreted as requiring a different conclusion.[4] The court further stated that

> [i]t would seem that it would be highly questionable that stock held in the treasury of a corporation which might be issued or might never be issued depending upon whether the optionees of such stock would or would not exercise their options could not[5] properly be considered as owned by the optionees for the purpose of applying the attribution rules under Section 318. Id. at 605, 18 A.F.T.R.2d at 6197.

The basis for the Bloch court's concern for the propriety of the Sorem court's dictum rests in Treas. Reg. § 1.302-3(a), which states in pertinent part:

> The requirement under Section 302(b)(2) shall be applied to each shareholder separately and shall be applied only with respect to stock which is issued and outstanding in the hands of the shareholders (Emphasis added).

Inasmuch as the "issued and outstanding" language, if read literally, would seriously reduce the effectiveness of Code § 318(a)(4) as it is applied to Code § 302(b)(2),[6] it was thought advisable to amend this section of the regulations at the time Rev. Rul. 68-601 was published. To date, this has not been accomplished, allthough a draft of an amendment to Treas. Reg. § 1.302-3(a) incorporating changes designed to eliminate the problem with respect to the "issued and outstanding" language has been prepared by our Legislation and Regulations Division (CC:LR-783, Br2:JKJ, 2-18-69).

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[4] It was not necessary for the Bloch court to rule on this issue, and therefore its statement should be considered dicta.

[5] The context of this quotation indicates that "not" was not intended to be inserted in this sentence.

[6] Authorized but unissued stock generally constitutes the corporate reserve against the future claims of optionees who have not yet exercised their options.

For the present, however, it should be emphasized that Rev. Rul. 68-601 provides the foundation for the proposed ruling, and if the Bloch court's view with respect to the "issued and outstanding" language were to become accepted, Rev. Rul. 68-601, and therefore the proposed ruling, would be of questionable force and effect.

We do not recommend that publication of the proposed ruling be suspended until Treas. Reg. § 1.302-3(a) is amended. We are, however, recommending to the Legislation and Regulations Division that action be taken as soon as possible with respect to this particular regulations project.

A draft of the proposed ruling incorporating our suggested changes is attached.

LEE H. HENKEL, JR.
Chief Counsel
Internal Revenue Service

Attachments:
Administrative file
Revised draft of proposed ruling
Control No. 71-5-21139

SECTION 318.--CONSTRUCTIVE OWNERSHIP OF STOCK
26 CFR 1.318-3; Estates, trusts, and options.
(Also section 302; 1.302-3.)

REV. RUL.

Advice has been requested concerning whether a warrant will be deemed an option within the meaning of section 318(a)(4) of the Internal Revenue Code of 1954 and must be taken into consideration in determining whether a redemption qualifies as

substantially disproportionate within the meaning of section 302(b)(2) of the Code.

X Association is an unincorporated business trust. X intended to qualify as a real estate investment trust ("REIT") within the meaning of sections 856-858 of the Code. To be certain of X's compliance with the requirement of section 856(a)(6) of the Code, that a REIT not be a personal holding company, an agreement and plan of redemption were entered into whereby 80,000 shares of X's common stock were redeemed from A for cash plus renewable term warrants to purchase 80,000 shares of X common stock. Prior to the redemption, A owned 170,000 shares of X and also held other nonrestrictive warrants to acquire 98,000 shares of X. A planned to treat the transaction as qualifying under section 302(b)(2) of the Code as a substantially disproportionate redemption.

The terms of the warrants distributed in the redemption stated they would be non-exercisable and nontransferable for a period of three years from the date of issuance and thereafter would be exercisable for two years only if the exercise would not endanger the REIT status of X under section 856(a)(6) of the Code as determined by the X trustees. If the warrants were not exercised at the end of the two-year exercise period due to the trustees' denial, the warrants would be renewed for a period of five years and could be exercised by A or his assigns on the earlier of the expiration of this five-year renewal period, or ninety days following the date of notification to A by X that exercise would not jeopardize X's status as a REIT under section 856(a) of the Code.

The treatment of distributions in redemption of stock is governed by the provisions of section 302 of the Code. Pursuant to section 302(c)(1) of the Code, the constructive ownership rules of section 318(a) of the Code applicable in determining the ownership of stock for purposes of section 302 of the Code.

Appendix I

Section 318(a)(4) of the code provides, in part, that if any person has an option to acquire stock, such stock will be considered as owned by such person. Neither Section 318 of the Code nor section 1.318 of the Income Tax Regulations defines the term "option."

Revenue Ruling 68-601, 1968-2 C.B. 124 states, in part, that:

> "In order for a warrant to acquire stock to qualify as an option, the holder must have the right to obtain the stock at his election. When this right to acquire stock exists, warrants or convertible debentures are not realistically different from options as referred to in section 318(a)(4) of the Code. In each instance, stock may be acquired at the election of the shareholder and there exist no contingencies with respect to such election."

The meaning of "at his election" as used in Revenue Ruling 68-601 is to distinguish an option from a bi-lateral contract and has no bearing on the time of exercise. The passage of time before a warrant may be exercised therefore will not change the fact that an option exists for purposes of section 318(a)(4) of the Code. Furthermore, for section 318(a)(4) to be inapplicable, any contingencies with respect to the election must be serious precedent conditions beyond the control of the taxpayer which could result in a substantial risk of forfeiture of the right to exercise the option.

Accordingly, based on the above criteria, the warrants distributed by X to A in redemption of X's common stock and the warrants previously owned by A are deemed to be options within the meaning of section 318(a)(4) of the Code. A does have a right to exercise the warrants received in the redemption of his stock at his election even though his first opportunity is three years after receipt. While it is the intention of the X trustees to maintain X's REIT status by not causing X's shares to become concentrated to an extent which is contrary to section 856(a)(6)

of the Code, it is also X's intention for A ultimately to be able to exercise the warrants issued in the redemption as evidenced by the renewal feature of the warrants. Furthermore, no serious precedent condition or contingency exists with respect to A's election. Consequently, it is held that the constructive ownership of stock rules in section 318(a)(4) of the Code are applicable in this case in determining whether a redemption is substantially disproportionate within the meaning of section 302(b)(2) of the Code and section 1.302-3 of the Regulations.

Thus, in the instant case, A owned, actually and constructively, the same number of shares of X before and after the redemption. Therefore, the distribution to A did not qualify as a disproportionate redemption of stock within the meaning of section 302(b)(2) of the Code.

Revenue Ruling 68-601, insofar as it relates to the determination of a warrant's status as an option within the meaning of section 318(a)(4) of the Code, is hereby clarified. The application of section 318(a)(4) to section 302(b)(2) redemptions as set forth in Revenue Ruling 68-601 will remain in full force and effect.

Appendix I

IRC PROVISIONS IN WHICH THE TERM "OPTION" APPEARS*

1. 26 U.S.C. § 46
2. 26 U.S.C. § 57
3. 26 U.S.C. § 72
4. 26 U.S.C. § 83
5. 26 U.S.C. § 101
6. 26 U.S.C. § 110
7. 26 U.S.C. § 162
8. 26 U.S.C. § 168
9. 26 U.S.C. § 178
10. 26 U.S.C. § 246
11. 26 U.S.C. § 246A
12. 26 U.S.C. § 263
13. 26 U.S.C. § 279
14. 26 U.S.C. § 318
15. 26 U.S.C. § 341
16. 26 U.S.C. § 401
17. 26 U.S.C. § 409
18. 26 U.S.C. § 414
19. 26 U.S.C. § 421
20. 26 U.S.C. § 422
21. 26 U.S.C. § 422A
22. 26 U.S.C. § 423
23. 26 U.S.C. § 424
24. 26 U.S.C. § 425
25. 26 U.S.C. § 467
26. 26 U.S.C. § 512
27. 26 U.S.C. § 542
28. 26 U.S.C. § 544
29. 26 U.S.C. § 554
30. 26 U.S.C. § 691
31. 26 U.S.C. § 807
32. 26 U.S.C. § 856
33. 26 U.S.C. § 897
34. 26 U.S.C. § 905
35. 26 U.S.C. § 1032
36. 26 U.S.C. § 1042
37. 26 U.S.C. § 1055
38. 26 U.S.C. § 1091
39. 26 U.S.C. § 1092
40. 26 U.S.C. § 1223
41. 26 U.S.C. § 1233
42. 26 U.S.C. § 1234
43. 26 U.S.C. § 1236
44. 26 U.S.C. § 1246
45. 26 U.S.C. § 1250
46. 26 U.S.C. § 1256
47. 26 U.S.C. § 1273
48. 26 U.S.C. § 1274
49. 26 U.S.C. § 1275
50. 26 U.S.C. § 1386
51. 26 U.S.C. § 1362
52. 26 U.S.C. § 1374
53. 26 U.S.C. § 1388
54. 26 U.S.C. § 1402
55. 26 U.S.C. § 1504
56. 26 U.S.C. § 1563
57. 26 U.S.C. § 2055
58. 26 U.S.C. § 2106
59. 26 U.S.C. § 2517
60. 26 U.S.C. § 5062
61. 26 U.S.C. § 6035
62. 26 U.S.C. § 6039
63. 26 U.S.C. § 6323
64. 26 U.S.C. § 7322
65. 26 U.S.C. § 7463
66. 26 U.S.C. § 7701

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* Statutory citations derived from Westlaw, USC Database